Supreme Court, U. S.
FILED
JUL 30 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-154

POTOMAC ELECTRIC POWER COMPANY,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA,

PEOPLE'S COUNSEL OF THE DISTRICT OF COLUMBIA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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July 30, 1979

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CERTIFICATE OF SERVICE

I hereby certify that I have this 30th day of July, 1979 served a copy of this Petition for a Writ of Certiorari to the District of Columbia Court of Appeals, by mailing three copies thereof, together with a copy of this certificate of service, postage prepaid, to counsel for all parties of record, as follows:

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Petitioner, Potomac Electric Power Company (Pepco) respectfully prays that a writ of certiorari issue to review the opinion and judgment of the District of Columbia Court of Appeals entered in Docket No. 10909 on March 16, 1979 dismissing as moot Pepco's Petition of Appeal with respect to a decision of the District of Columbia Public Service Commission entered on April 26, 1976, even though Pepco's Petition had been timely filed three years earlier under a statute providing for expedited appellate procedures.

OPINIONS BELOW

The opinion of the District of Columbia Public Service Commission along with the Separate Views of Commissioner Stratton are unreported and are reprinted *infra* at Appendix A. The Commission's order denying reconsideration is unreported and is reprinted *infra* at Appendix B.

The opinion and order of the District of Columbia Court of Appeals is not yet reported and is reprinted *infra* at Appendix C. The order of the Court of Appeals denying a timely petition for rehearing *en banc* is not yet reported and is reprinted *infra* at Appendix D.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on March 16, 1979. A timely petition for rehearing or rehearing *en banc* was denied on May 8, 1979. This petition for a writ of certiorari was filed within ninety days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1257(3) (1976).

QUESTIONS PRESENTED

1. Whether, by refusing to grant an application for an emergency interim rate increase and thereby guaranteeing that Pepco could have no opportunity to earn its authorized rate of return in the District of Columbia, the Public Service Commission denied Pepco substantive due process and confiscated Pepco's property without just compensation in violation of the Fifth Amendment to the Constitution of the United States?

2. Whether the Court of Appeals' dismissal for mootness of Pepco's appeal from the denial of emergency

interim rate relief, in the context of the Court's own delay in hearing and deciding the case pursuant to a statute which accords preference to such appeals over all other civil matters, denied Pepco substantive and procedural due process of law and resulted in the confiscation of Pepco's property without just compensation in violation of the Fifth Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISIONS INVOLVED

The due process and just compensation clauses of the Fifth Amendment to the Constitution of the United States:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Pepco is a public utility engaged in the business of supplying electricity in the Washington, D.C. metropolitan area. As such, its retail rates and services are subject to regulation by the District of Columbia Public Service Commission (Commission), as well as the Maryland Public Service Commission, and the Virginia State Corporation Commission.

On December 29, 1975—only 16 days after placing a $27.7 million permanent rate increase in effect in the District of Columbia pursuant to an order of the Commission based upon 1974 conditions—Pepco filed an application with the Commission for a new permanent increase in its retail rates in the District of Columbia

designed to increase annual revenue by an additional $57.6 million based on 1975 conditions.[1]

Concurrent with the filing of the new application for permanent rates, Pepco also filed an application for an emergency interim rate increase in the amount of some $24 million to be collected subject to refund pending the final order on the permanent phase of the proceeding.

In support of the emergency interim application, Pepco presented evidence to show that it was in the worst financial condition in its history as an independent company, and was effectively precluded from entering the capital markets to obtain necessary funds. During 1975, Pepco had earned the lowest rate of return of any electric utility in the United States, save one. Pepco's evidence of recent operating results showed that earnings per share had fallen below the level of Pepco's annual dividend rate. Pepco was legally precluded from marketing preferred stock because coverage levels were below minimum charter requirements. Pepco was effectively precluded from issuing first mortgage bonds because of the likelihood under the prevailing conditions that any issue would result in a severe downgrading of the Company's bond ratings. Any sale of common stock would have required an offering at only 75% of book value. Moreover, Pepco's

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[1] The Court of Appeals' *en banc* decision in Docket No. 10490 upholding the Commission's prior authorization of a $27.7 million rate increase—and vacating the decision of a three-judge panel of that Court which had reversed and remanded the Commission's decision—is the subject of another Petition for a Writ of Certiorari which Pepco is filing simultaneously with this Petition.

common stock had been selling for months in the range of $10½ to $11½—perilously close to the statutory $10 level below which the Company is legally precluded from marketing common stock at all.

Pepco's actual overall rate of return on its investment in the District of Columbia during 1975 was more than 25% below the level authorized by the Commission, and Pepco's actual return on equity in the District of Columbia during 1975 was approximately *one-half* the 13% level specifically found by the Commission to be necessary to attract capital. Projections of 1976 results, even after taking into consideration the $27.7 million permanent rate increase so recently approved by the Commission, showed a return on average District of Columbia equity investment still only about *two-thirds* of the 13% level which had just been specifically found by the Commission to be necessary to attract equity capital.

Pepco presented evidence demonstrating that current and projected earnings levels had required substantial cut-backs and deferrals in plant and operating expenditures which had the present effect of (1) reducing service reliability and (2) crippling the Company's ability to obtain new permanent capital necessary to finance its 1976-1977 construction program. All this evidence was uncontroverted.

On April 26, 1976—fully four months after the filing of the emergency application and supporting testimony and exhibits—a majority of the three-member Commission issued its five page Findings, Opinion and Order denying Pepco's request for an emergency rate increase. The majority found that Pepco's interim rate increase application had not met the following three

criteria which the Commission had previously established as the basis for granting interim rate relief:

> (1) a present or clearly imminent threat that the utility will be unable to continue to meet its public service obligation; (2) a present or clearly imminent threat that the utility will be unable to obtain necessary capital funds, and (3) that the utility's earnings produce a rate of return substantially less than reasonable. (Appendix A at 2a)

Commissioner Stratton abstained from the decision and subsequently filed a 52 page statement of Separate Views wherein he observed with respect to the subject of emergency interim ratemaking generally:

> In recent years we have observed the very deleterious effects of delay (and other attributes of regulatory lag) upon the financial strength of the utilities we regulate. The consequences of this financial weakness will be visited upon the consuming public in the form of higher capital costs for years to come, and perhaps even in reduced reliability of service. In the final analysis, I believe the public is better served when regulatory commissions take the long-view of their responsibilities, not the least of which, as the Supreme Court has told us, is to refrain from undermining the financial health of the regulated utilities. Recent history has demonstrated, and I fear the near future will confirm, that our illiberality in responding to demonstrated exigencies have had that effect. Therefore, I recant. (Appendix A at 16a-17a)

On April 29, 1976, Pepco filed its Application for Reconsideration of the Commission's decision and an accompanying motion for expedited consideration. The Application for Reconsideration argued that Pepco had submitted evidence meeting the Commission's criteria for interim rate relief. Pepco further stated that,

as a matter of law, denial of interim rate relief in the circumstances would contravene the provisions of the Fifth Amendment of the United States Constitution which require substantive due process and prohibit the confiscation of property without just compensation, since the denial would guarantee that Pepco would have no opportunity to even approach the return on equity specifically found by the Commission to be necessary to attract capital.

On May 17, 1976, the Commission denied Pepco's Application for Reconsideration and the Company appealed the denial of interim rate relief to the District of Columbia Court of Appeals pursuant to 43 D.C. Code Ann. § 705 (1973) which accords preference to such appeals over any other civil action of a different nature:

> Any public utility or any other person or corporation affected by any final order or decision of the commission . . . may . . . file with the clerk of the District of Columbia Court of Appeals a petition of appeal setting forth the reasons for such appeal and the relief sought. . . . Within twenty days of the receipt of such notice of appeal the Commission shall file with the clerk of said court the record. . . . Within this period the Commission or any other interested party shall answer, demur, or otherwise move or plead. Thereupon the appeal shall be at issue and ready for hearing. *All such proceedings shall have precedence over any civil cause of a different nature pending in said court, and the District of Columbia Court of Appeals shall always be deemed open for the hearing thereof.* (Emphasis supplied)

Along with its Petition of Appeal, Pepco filed its brief with the Court of Appeals and a motion for expedited

decision, simultaneously waiving its right to file a reply brief.

On October 5, 1976—4 months after the appeal was filed—oral argument was held. On January 14, 1977—7 months after the appeal was filed—the Commission filed a motion with the Court of Appeals to dismiss the case, alleging that the Commission's December 31, 1976 decision with respect to Pepco's permanent rate application mooted the appeal of the denial of interim rate relief. The Commission, however, was not of one mind on its motion to dismiss the appeal. Commissioner Stratton noted his opposition to the motion in a separately filed memorandum stating that the appeal "presents issues of a recurring nature that should be decided now under the doctrine of *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U.S. 498".

On March 16, 1979—35 months after the appeal was filed, 29 months after oral argument, and 26 months after the motion to dismiss was filed and answered—the Court of Appeals issued a *per curiam* opinion and order dismissing the appeal as moot.

Thereafter, on March 30, 1979, Pepco filed a timely petition for rehearing or rehearing *en banc* by the Court of Appeals urging that the issue on appeal is the lawfulness and constitutional sufficiency of the criteria employed by the Commission for the review of Pepco's interim rate application, and that this issue is not mooted by the issuance of a subsequent Commission order which is based on an entirely different set of criteria applicable to permanent rate applications.

The Court of Appeals denied Pepco's petition for rehearing or rehearing *en banc* in a *per curiam* order issued on May 8, 1979.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals in granting the motion to dismiss Pepco's petition on the ground of mootness was, under all the circumstances, so unreasonable as to abridge Pepco's right to both substantive and procedural due process of law and is in conflict with applicable Supreme Court decisions respecting the constitutional sufficiency of utility rate orders.

I

The Commission's Refusal To Grant The Emergency Interim Rate Application Guaranteed That Pepco Could Have No Opportunity To Earn Its Authorized Rate Of Return In The District Of Columbia And Thereby Denied Pepco Substantive Due Process And Confiscated Pepco's Property Without Compensation In Violation Of The Fifth Amendment To The Constitution Of The United States

While utilities are not, of course, guaranteed a return, Pepco must be afforded the *opportunity* to earn a just and reasonable rate of return on its District of Columbia investment in order that it may continue to provide reliable electric service to its District of Columbia customers. Ratemaking to achieve this end result has been the subject of numerous decisions by this Court on constitutional grounds. The method for determining whether a commission has fixed "just and reasonable" rates is the "end result" test embodied in *Hope:*

> [I]t is the result reached, not the method employed, which is controlling. *Federal Power Comm'n* v. *Hope Natural Gas Co.,* 320 U.S. 591, 602 (1944).

The "end result" of denying needed emergency relief, because of the unlawful application of criteria for granting such relief, is the guarantee that a utility has

no opportunity to earn its authorized rate of return. Under the *Hope* doctrine, a commission may not, consistent with its enabling act and with the Constitution, force a utility to continue to operate at rates that will not permit it to attract capital on reasonable terms. Yet, that is precisely the effect of the Commission's refusal to grant an emergency interim rate increase subject to refund in this case on the basis of criteria which have been construed so narrowly as to unconstitutionally deprive Pepco of its property without compensation.

In order for the Commission's criteria for interim rate applications to conform to constitutional standards, they require judicial clarification. But the Court of Appeals has unaccountably abdicated its responsibility in this regard by dismissing Pepco's appeal *years* after it was filed under an expediting statute which accords preference to such appeals over any other civil action of a different nature. 43 D.C. Code Ann. § 705 (1973).[2]

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[2] The unreasonable refusal of the Court of Appeals to take jurisdiction in this appeal, which addresses the issue of lawful standards for emergency interim rate relief, comes at a time when utility rate regulation in the District of Columbia is collapsing under the weight of regulatory delay.

Pepco's most recently concluded permanent rate case (Formal Case No. 685) was pending before the Commission for 24 months before a decision was finally issued in July, 1979. For many months before the Commission's order issued in that Case, it had been the *oldest* electric utility rate application in the United States where no rate relief had been authorized. That proceeding was also the subject of a request for emergency interim rate relief and two petitions for writs of mandamus filed by Pepco in the Court of Appeals, pursuant to its special rules of court, wherein Pepco asked that the Commission be ordered to issue a final decision.

The Commission's criteria for interim rate relief in the District of Columbia, which require a showing that there is a threat to a utility's ability to finance, a threat to a utility's ability to meet its service obligations, or that a utility's earnings produce a rate of return substantially less than reasonable, cannot constitutionally be applied on the basis of a multijurisdictional utility's *systemwide* financial condition. The Commission, however, has unlawfully relied on Pepco's systemwide rate of return, rather than the return on its District of Columbia business, in refusing to grant interim rate relief in this case.

By reference to Pepco's systemwide return—including earnings in Maryland and Virginia—the Commission erred as a matter of law by using the substantial and prompt rate increases granted the Company by regulatory agencies in Maryland and Virginia as a basis for denying emergency rate relief in the District of Columbia. The Commission attached no significance to the undisputed evidence of record which showed (1) that Pepco's actual 6.85% overall rate of return on its investment in the District of Columbia during 1975 was substantially below the 9.1% return authorized by the Commission, (2) that Pepco's actual 6.09% rate of return on equity in the District of Columbia during 1975 was 53% below the 13% level specifically found by the Commission to be necessary to attract capital on reasonable terms, and (3) that Pepco's projected return on District of Columbia equity in 1976 would still be only about two-thirds the level which the Commission had found necessary to attract equity capital.

The Commission's "utility earnings" criterion must depend on a showing that Pepco's *District of Columbia* rate of return, rather than the systemwide return, is

substantially less than reasonable. Rate regulation in the District of Columbia must be based solely upon the cost of providing service in that jurisdiction. To take into consideration the results from other jurisdictions would result in subsidy, denial of due process and confiscation of Pepco's property. *Smith* v. *Illinois Bell Tel. Co.,* 282 U.S. 133, 148-50 (1930).

II

The Decision Of The Court Of Appeals To Dismiss Pepco's Appeal On The Ground Of Mootness Was So Unreasonable Under The Circumstances As To Deny Pepco Both Substantive And Procedural Due Process Of Law

Pepco is entitled to an independent judicial determination of whether the Commission erroneously applied the law of the District of Columbia and the decisions of the Supreme Court with respect to the constitutional sufficiency of utility rate orders when it refused to approve the Company's application for an emergency interim rate increase to be collected subject to refund. *St. Joseph Stock Yards Co.* v. *United States,* 298 U.S. 38, 84 (1936).

The Court of Appeals' decision, however, effectively rendered meaningless the statutory appellate process in the District of Columbia by abdicating to the Commission the ultimate authority to determine the legal sufficiency of its own decisions respecting emergency rate applications. The Court of Appeals completely ignored its responsibilities with respect to the review of utility rate orders as set forth by this Court in the *Permian Basin Area Rate Cases,* 390 U.S. 747, 790-792 (1968).

Pepco respectfully submits that so eggregious is the Court of Appeals' dismissal as moot of a case of first importance in regulatory law three years after it was filed under a statute mandating expedited review, that

not only utility regulation but judicial review thereof has collapsed in the District of Columbia. This case was thoroughly tried and thoroughly briefed and argued on appeal and no reason exists for its dismissal.

Pepco's appeal of the denial of emergency rate relief was clearly and unequivocally based on the contention that the Commission's application of criteria for granting such relief were inconsistent with the law of the District of Columbia and constitutional standards enunciated by the Supreme Court. It was for these reasons that Pepco urged in its Petition of Appeal that the Court of Appeals declare that the limited criteria of the Commission for emergency rate relief are unreasonable as a matter of law and unconstitutional in application.

Despite Pepco's clear statement of the nature of the issue before the Court of Appeals and the required relief, the Court chose in its Memorandum Opinion and Order dismissing the appeal as moot, three years after it was filed, to treat the case as having to do only with the award of interim rates during the pendency of a permanent rate application before the Commission. The Court acknowledged the doctrine of *Southern Pacific Terminal Co., supra,* that administrative wrongs of short duration but likely to recur do not become moot, and acknowledged that the issues on appeal "will probably recur". Nonetheless, the Court of Appeals unaccountably and unreasonably dismissed Pepco's petition for "lack of a practical remedy".

In so ruling, the Court of Appeals denied to Pepco any means of testing the constitutional sufficiency of the Commission's emergency ratemaking criteria and

the application thereof, resulting in the denial of any opportunity to earn the return found necessary by the Commission to attract capital. The Company is left in the untenable position of being required to conform to ratemaking standards which are contrary to the United States Constitution and the law of the District of Columbia. Moreover, since the Commission purported to apply continuing standards with respect to interim rate applications, future applications will produce the same unlawful result.[3]

An issue which is likely to recur, yet evades review due to its short term pendency, has long been recognized as an exception to the mootness doctrine. *Roe* v. *Wade,* 410 U.S. 113, 125 (1973); *Moore* v. *Ogilvie,* 394 U.S. 814, 816 (1969); *Southern Pacific Terminal Co., supra,* at 514-16. Indeed, this exception to the mootness doctrine applies most broadly to administrative agency review. *Big Rivers Electric Corp.* v. *EPA,* 523 F.2d 16, 19 (6th Cir. 1975); *Golden Holiday Tours* v. *CAB,* 531 F.2d 624, 626 (D.C. Cir. 1976).

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[3] Pepco has applied to the Commission for emergency interim rate increases on two occasions since the denial of interim rate relief which is the subject of this Petition.

On December 21, 1978, Pepco requested emergency interim rate relief in Commission Case No. 685. The Commission did not so much as acknowledge receipt of the Petition until after Pepco filed a Petition for Writ of Mandamus with the Court of Appeals on June 7, 1979 requesting that the Court authorize Pepco to place its emergency interim surcharge in effect, pending a final decision by the Commission on permanent rates in that case.

On June 21, 1979, Pepco filed with the Commission an application for emergency interim rates in Case No. 715 which is presently pending before the Commission. The Commission has stated that it will decide this application on the basis of the same criteria which are the subject of this Petition for Writ of Certiorari.

The Court of Appeals' decision unreasonably ignores the public importance and recurring nature of the issue presented herein. That issue is the lawfulness and constitutionality of relying upon *systemwide* financial results to justify denial of emergency rate relief in the District of Columbia required by *District of Columbia* financial results.

This issue is not moot. There is still a remedy which is required if Pepco is ever to be permitted the constitutionally mandated opportunity to earn its authorized rate of return. That remedy lies in the specification by the Court of the constitutional requirements for interim ratemaking criteria.

The latitude of the Court of Appeals to develop doctrines of judicial administration that permit it to decline jurisdiction in cases where there is no jurisdictional bar to consideration of the matter on appeal must be exercised within reasonable bounds. Where, as here, litigation involves the actions of public officials which are virtually certain to be repeated, the public interest in assuring enforcement of the legislative will and constitutional mandates with respect to those actions requires that the Court of Appeals not lightly set the case aside on the ground of mootness. *See United States* v. *W. T. Grant Co.,* 345 U.S. 629 (1953); *Alton & Southern Railway Co.* v. *International Ass'n of Machinists & Aerospace Workers,* 463 F.2d 872 (D.C. Cir. 1972); *Green* v. *Connally,* 330 F. Supp. 1150 (D.D.C. 1971), *aff'd sub nom. Coit* v. *Green,* 404 U.S. 997 (1971).

Emergency rate requests are and will continue to be futile unless the Court mandates the legal criteria for such relief. The Commission did not announce a mere *ad hoc* decision on interim rates, but purported to

apply continuing standards which will lead to the same unlawful result whenever circumstances again demand interim ratemaking.

CONCLUSION

For these reasons, Pepco urges that this Court grant this petition for a writ of certiorari to the District of Columbia Court of Appeals; that this Court reverse the order of the Court of Appeals; and that this Court direct the Court of Appeals to reverse the decision of the Commission with instructions ordering the Commission to rely upon District of Columbia financial results rather than systemwide financial results in reviewing applications for emergency rate relief consistent with the standards of the due process and just compensation clauses of the Fifth Amendment to the Constitution of the United States.

Respectfully submitted,

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APPENDIX

APPENDIX A

PUBLIC SERVICE COMMISSION OF THE
DISTRICT OF COLUMBIA

1625 I Street, N.W., Washington, D. C. 20006

April 26, 1976

Order No. 5782

IN THE MATTER OF

Application of POTOMAC ELECTRIC POWER COMPANY for an increase in its retail rates for the sale of electric energy	))))	Formal Case No. 651

Interim Order

BEFORE THE COMMISSION: Ruth Hankins-Nesbitt, Chairperson; H. Mason Neely, Vice Chairman; and William R. Stratton, Commissioner

On December 29, 1975, Potomac Electric Power Company (PEPCO) concurrently filed with the Commission an application for a permanent rate increase in the amount of $52,324,000 and an application for an immediate interim increase contemplating a surcharge of 12.89% to be applied to all existing rates, with the exception of street lighting and traffic signals, designed to produce some $21,479,000 on an annual basis and the amount requested was subsequently increased to $23,938,000.

On March 16, 1976, public hearing was held by the Commission on the PEPCO interim rate increase applica-

tion. Following the hearing, briefs were filed by PEPCO, the Apartment and Office Building Association of Metropolitan Washington, Inc. (and Columbia Realty Venture), the General Services Administration, and People's Counsel. The Apartment Association, GSA, and People's Counsel opposed grant of the interim increase application, as did the Commission's staff in testimony by Deputy Chief Accountant, Mr. Norman D. Reiser. The General Services Administration also filed a motion to dismiss the interim increase application, a motion which was taken under advisement by the Commission.

The issues presented by the PEPCO interim increase application are essentially simple ones. In a number of prior cases this Commission has had occasion to consider and establish standards or criteria on the basis of which applications for interim or emergency rate increases would be judged. The question before us for decision today is, then, whether the facts of PEPCO's current operations in the District of Columbia are such that those criteria or standards are met.

As set forth in our Order No. 5707 these criteria are; (1) a present or clearly imminent threat that the utility will be unable to continue to meet its public service obligation; (2) a present or clearly imminent threat that the utility will be unable to obtain necessary capital funds, and (3) that the utility's earnings produce a rate of return substantially less than reasonable.

It is PEPCO's contention, as we understand it, that the Commission has a basic responsibility to establish just and reasonable rates, and in so doing afford PEPCO the opportunity to earn at a reasonable rate of return. PEPCO asserts that its operating results for the year 1975, adjusted to annualize rate increases granted in that year, clearly show that PEPCO did not and indeed cannot earn the rate of return found reasonable in Formal Case No. 630, decided by this Commission on November 12, 1975.

Its inability to earn that rate of return, according to PEPCO, will result in a chronic inability to enter the financial markets at reasonable cost, despite the fact that the company's construction budget has been substantially reduced and plant and operating expenditures have been cut back or deferred. PEPCO's current financing plans contemplate the issuance of $50,000,000 in common stock and $50,000,000 in bonds around mid-1976. Without interim relief, it is PEPCO's view that the costs of these contemplated issues would be unreasonable.

In opposing the application for interim relief, intervenors and our staff take the position that PEPCO has not demonstrated a present or clearly imminent threat that it will be unable to continue to meet its public service obligations or that it will be unable to obtain necessary capital funds. Additionally, intervenors and staff assert that the mere failure of PEPCO to earn the previously authorized rate of return is insufficient to warrant interim relief, unless earnings are substantially less than that previously found by the Commission to be reasonable. This is not the case, according to intervenors and our staff, presented by the current PEPCO application, which shows a rate of return of about 13.6% below the 9.1% last authorized.

On consideration of the evidence of record bearing on this matter and the pleadings, briefs, and arguments of the parties we are disposed to deny PEPCO's request for an interim rate increase at this time.

As we see it, the operating picture presented by PEPCO for the years 1975 and 1976 falls far short of presenting the classic case of a utility requiring interim relief, and PEPCO's arguments that it has met the previously established criteria for such relief, or that if not, the criteria should be changed, are equally unpersuasive. In this regard, we note in particular that PEPCO does not argue that it cannot meet its public service obligation, but rather that without immediate rate relief it may not be able to at

some indefinite time in the future. Similarly, PEPCO does not contend that it is unable to obtain financing, but rather that absent an improvement in earnings, it fears that its proposed 1976 financing will result in higher cost of some undetermined magnitude.

At this time, PEPCO's concerns in both service and financing area appear to us to be highly speculative. Moreover, we are impressed by the evidence of record indicating that PEPCO's earnings no longer show the downward trend of recent years but appear rather to be showing a significant and substantial upward trend. For example, by PEPCO's own testimony its earnings on equity, which were at the 7.86% level in 1975, are projected to reach 11.5% at year end 1976 without rate relief of any kind, a figure that would be reduced to 11.08% by the $100,000,000 financing plan contemplated by PEPCO in 1976. The market price of PEPCO's common stock, although it remains below book value, has risen from the $10.50-$11.50 range at which it sold around the time of PEPCO's interim increase filing to almost $12.50 in mid-March 1976, an increase which in terms of percentage exceeded the gain shown by the Dow-Jones utility index. Earnings per share also appear to be trending upward, and the projected ratio of earnings to fixed charges shows an improvement to 2.7 times by year end 1976 even with the company's contemplated additional financing. Internally generated funds also appear to be at a substantially higher level in 1976 than in 1975, and are in fact sufficient in amount to permit the company to finance virtually all planned construction expenditures through internal funds. Finally, although PEPCO witnesses expressed concern over bank lines of credit and possible downgrading of securities, neither eventuality was expected by these witnesses to come to pass. Given these facts of record, it is obvious that PEPCO is now in a far better financial position than it was in May of 1975 when this Commission denied a PEPCO request for interim rate relief.

It seems to us that PEPCO is essentially seeking through its interim increase application a "make whole" revenue package, a concept which we find foreign to the theory and purpose of interim increases. We need not be reminded, as PEPCO has sought to do here, of our responsibility as a regulatory body to afford the utilities subject to our jurisdiction the opportunity to earn a reasonable rate of return. Our responsibility in this regard, however, does not extend to a continuing guarantee of a fair rate of return, either on an interim or on a permanent basis, nor does it warrant, in our judgment, the curtailment of the rights of all parties concerned to a full hearing on the merits of the case as well as our need for a complete record on which to base informed judgment.

Under the circumstances, therefore, we are constrained to deny PEPCO's application for an interim rate increase and we will proceed with all deliberate speed to conclude the proceedings on PEPCO's permanent application in accordance with the expedited schedule which we have ordered in this case.

THEREFORE, IT IS ORDERED:

That PEPCO's application for interim rate relief in the amount of $23,938,000 be and the same hereby is denied.

A TRUE COPY:

By the Commission:

/s/ RUTH HANKINS-NESBITT
Ruth Hankins-Nesbitt
Chairperson

Chief Clerk

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA

1625 I Street, N.W., Washington, D. C. 20006

MAY 12, 1976

IN THE MATTER OF

Application of POTOMAC ELECTRIC POWER COMPANY for an Increase in its Retail Rates for the Sale of Electric Energy	)	Formal Case No. 651

SEPARATE VIEWS OF COMMISSIONER WILLIAM R. STRATTON ON APPLICATION FOR INTERIM RATES, TOGETHER WITH SOME OBSERVATONS ON THE SUBJECT OF EMERGENCY AND INTERIM RATE-MAKING IN DISTRICT OF COLUMBIA PUBLIC SERVICE COMMISSION UTILITY RATE PROCEEDINGS

I.

When a utility files an Application for an Interim Rate Increase before the ink is dry on the final order in its previous rate case[1] you know you are in an unusual proceeding.

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[1] Indeed, the final order in Case 630 was still under statutory reconsideration by the Commission.

Like the mule clouted with a two-by-four, my attention was captured by this opening salvo in Case 651.[2] This led me to restudy the cases[3] and Commission Orders[4] granting or denying interim rate requests.[5]

It helps to understand these orders if you know that the Public Service Act of the District of Columbia is not typical of state regulatory laws in several important respects. For example, in 33 of the states the law requires the regulatory commisson to decide a rate case within a specified period of time, and provides that new rates take effect automatically if agency action is not completed by expiration of this time. In seventeen states and the District of Columbia new rates do not take effect until ordered by the Commission.[6]

Also, the District of Columbia Public Utility Act does not explicitly permit or prohibit emergency or interim adjustments of utility rates. In the absence of a statutory standard to deal with requests for swift upward or downward revisions in utility rates the Commission has proceeded under the implied powers section of the Public Utility Act[7] to establish its own standards subject to ju-

[2] A sense of candor compels acknowledgment of the relationship of this filing to the prior case. As yet another ploy in Case 630 it should be promptly squelched as has been done. Rectification of the shortcomings of the decision in that case, if it is to come, will be by the Court.

[3] Cases 541, 567, 568, 570, 595, 596, 610 and 630.

[4] Orders 5402, 5419, 5494, 5509, 5517, 5518, 5523, 5627, 5636, 5644, 5707 and 5725.

[5] It appears from a review of Commission records that no applications for emergency or interim rate changes were filed until about seven years ago in Formal Case 541 (PEPCO). Requests for interim or emergency rate increases have been made by the utility in every major rate case but one since.

[6] "Federal and State Commission Jurisdiction and Regulation" FPC Publication S-231 (1973)

[7] 43-1003 D.C. Code.

dicial review of its authority and the reasonableness with which it is exercised.

At the outset, the distinction between emergency and interim rate-making should be drawn. These words, of course, have very different meanings, but this difference has sometimes been blurred in Commission orders. These meanings should be recognized and preserved in Commission usage if our orders in turn are to have meaning as touchstones of Commission policy.

An emergency is an unforeseen occurrence, a sudden and urgent occasion for action. Interim, when used as a noun, means an intervening time or "in the meanwhile"; when used as an adjective it means temporary or provisional.

It is readily seen that the words relate to different concepts. Rate orders are either interim or final. An interim rate order is entered pending the outcome of a case, at which time it is susperseded, confirmed or changed by the final order. When entered during a pending case, an interim order is by definition based on an incomplete record. If the record were complete a final order could be entered. The fact that an order is interim in nature has no necessary relationship to the reasons why it is entered. In practice before this Commission, interim rate orders—in the sense that they are entered before a case is concluded—are considered to be extraordinary relief. They are extraordinary not because they are interim but because we have required a showing of extraordinary circumstances before we will change rates by interim order. Upon a showing of extraordinary circumstances this Commission has ordered rates into effect on short notice; sometimes we have described these extraordinary circumstances as emergencies. In fact, though, the bare, unadorned words in which the Commission has described the conditions which must be met before revisions in rates will be made on a temporary basis partake of both emergency and nonemergency criteria. This

case is an example, Order 5782 speaks of "present" or "clearly imminent" threats of serious financial adversity.

A Digression On Emergencies

The only response which it is within the Commission's power to give in an emergency is to adjust rates. Quite frankly, it is difficult to envision the emergency—if the word is used in its ordinarily understood sense—in which a change in rates, however speedy, would afford the succor required by a utility or its customers to cope. Some of our orders suggest that if a utility is unable to meet a payroll an instant rate change would be in order. This describes a situation that is critical, but hardly an emergency; for if the foregoing scenario is ever played it is hard to envision its being unforseseen. Corporations with assets and revenues in the hundreds of millions of dollars just don't wake up in the morning and unexpectedly find themselves unable to get through the day. Such a company's condition on a given day is the result of history and the planning and operations of previous years and months, it is foreseeable and predictable, particularly in the case of a public utility which conducts its affairs even more in a fish bowl than other businesses. If the day comes when this Commission must give an emergency rate increase to meet a payroll it will signal the bankruptcy of both regulation and utility management in this jurisdiction, for these two hands will be the ones that will have allowed a cornerstone of the city's economic structure to come to the brink of disaster. So, it is doubtful if "Act-of-God" emergencies are amenable to correction by rate increases, however swift. What is meant, as I apprehend it, by our use of the word emergency is a financial deterioration so great as to require fast remedial action. But this deterioration, as we have had occasion to observe over the last two years of unprecedented pressures on operating and capital costs upon revenues, does not occur overnight. Significant trends in financial indicators can only develop and be observed over time, and

their reversal can only be accomplished over time after Commission action is taken.

II.

In Cases 541 and 567 the Commission gave earnest consideration to the claims of urgent need pressed upon it by the utilities as is perhaps best demonstrated by the orders ultimately granting interim rate relief in those two cases. What the Commission was unable to do in those cases was to overcome the delays inherent in the regulatory process itself. In both cases the allegations of the petitioning utilities were borne out, and once established on the record the Commission moved without hesitation to take ameliorative action. Where the problem lay, if it is fair to call it a problem, was in the time required to build a record upon which the Company's claims could be considered. In both these cases it took almost a year—the entire Phase I of the case—to establish the record. Meanwhile, of course, the companies' condition continued to deteriorate. If these companies had faced emergencies in the usual sense of the word our action would have been too late.[8]

The next series of cases, 568, 570, and 595, represent the Commission's reaction to the inevitable attempt by every utility in every case to climb on the interim increase band wagon. In the first two of these cases the principle was established that determination of a revenue deficiency does not carry with it an immediate entitlement to rates that will provide the needed revenues. In other words, regulatory lag was institutionalized. This principle was put to the test in Case 595, which epitomizes the time-taking aspects of the regulatory process when complex and hard-fought issues are joined. In that case the Commission found a point at which the pernicious effects of regulatory lag reached intolerability and prescribed a solution tailored

[8] The Appendix contains more detail about the cases.

to the particular rate design diversity of the telecommunications utility.

Case 610, different from every other case, commenced with an emergency application for temporary rates. The Gas Company described a critical and rapidly deteriorating financial condition, one which would jeopardize coverages and the ratings of its senior securities. Given the seasonality of the gas business, the certainty of deepening decline in the indicators of financial health of the Company was self-evident. The Commission struggled to reconcile the requirement for a hearing and a record upon which to base a rate order with the clear, present need for a rate adjustment. The staff had early identified several expense and rate base issues. The question was whether these issues—and any other rate-making issue that might be identified—would have to be litigated and decided before the Commission could enter a decision on the emergency application. The answer was a while coming. When it came it was elegant, in the way scientists use the word: simple and direct. The quantifiable issues (accounting adjustments) were quantified, and the quantities were put on the shelf to be examined at leisure as the case progressed; the rate-of-return judgment of the prior case was adhered to *pro tempore*. Thereby the maximum amount of the interim rate increase was established within an "uncontested zone."

contested	A1	)	Company request
uncontested	A2	)	
present rates			

The Company had sought a rate increase of 19 per cent. Entitlement to 5 per cent of the 19 per cent was disputed. Thus, 14 per cent of the 19 per cent was justified in the rate-making sense. This amount having been identified, the question for the Commission was whether to award it in advance of the final order in the case. By the time of the Company's second application for temporary rates its need for prompt rate relief was beyond doubt. Its condition was desperate and worsening. Delay of rate relief while the case wound on would only contribute further deterioration. The Commission, therefore, acted to grant the Company's request and interim rates took effect only six months after the initial filing.

In Case 630 the Commission had occasion to review its precedents on interim rate-making and twice found that the utility had failed to establish a *prima facie* case for interim relief.

III.

To distill meaning from the cases two questions were examined. First: Is there an objective state of facts upon which this Commmision will award interim relief? Second: What "procedural protections," to use the Commission's language, must attend a grant of interim relief: Unhappily, there is not a clear answer to either question.

As to the first, quantification of the degree of financial impairment or service deterioration which will support a grant of temporary rates has been lacking. The decisions seem to turn on distinctions involving the imminence of service interruption or financial disaster, or on potential *versus* actual inability to attract capital, or on what level of earnings constitutes a rate of return that is substantially less than reasonable. These are elusive criteria. When the application of these criteria is examined their inutility as predictive indicia of Commission action becomes apparent. For example, applications for interim rate increases

were twice dismissed in Case 630 under circumstances clearly more deleterious than those prevailing in Case 541 when an interim rate increase was granted.

This brings us to the second question, what due process foundation is necessary to support Commission action on an interim rate application?[9]

Time and again the Commission's orders have discussed the procedural requisites:

> "There is a heavy burden upon the Company to allege and establish the existence of circumstances which *warrant departure from the normal rate-making process*. This principle was stated in Washington Gas Light Co., Order No. 5517, at page 5, dated June 26, 1972. This burden is imposed upon the Company, in order to justify an interim proceeding, which by its very nature tends to *abridge the usual procedural rights* afforded to the other parties in the normal rate-making process. Further, the courts have held that where circumstances exist which warrant interim relief, the regulatory body may not be required to make the full and complete findings on the record which might otherwise be required of it in the case-in-chief, *Payne* v. *WMATC*, 415 F.2d 901, 907 (1968). The central issue, then, is to identify those factors and circumstances, which the Company faces, that are so critical that they justify the possible *abridgment of the usual procedural rights* of the parties and justify administrative action on what might be otherwise considered to be a less than adequate record." Order 5707, p. 2, 3. (Emphasis mine.)

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[9] Under Section 6(c) of the District of Columbia Administrative Procedure Act, §1-1505(c) D.C. Code, 1973, Edition, temporary rule-making without notice is permitted when necessary for the immediate preservation of the public peace, health, safety, welfare, or morals. For reasons set out earlier in this paper it is difficult to envision the situation in which this statute would apply to utility rate-making.

A search for the meaning of the underlined, oft-repeated phrases is required. What is "the normal rate-making process?" What are "the usual procedural rights?"

My conclusion, after analysis of our many interim rate orders, is that the departures and abridgments referred to are not of the right to notice and hearing, but rather of the expectation that every rate-making issue in the case will be heard and decided before any rate order at all is entered, a process that takes more than thirteen months on average before this Commission. During those months the financial condition of the utility involved can decline perilously, as the last case involving PEPCO demonstrated. This decline can reach the point, as we have recognized on occasion, where action cannot be any longer withheld. In some of those cases we have acted, thus demonstrating that there is no insurmountable procedural impediment to action.

Case 610 demonstrated the elementary proposition that an emergency or interim rate proceeding can stand on a different footing from a normal, "full-blown" rate case. In that case, it will be recollected, the Commission found—on the basis of adherence to prior determination on some issues and resolution of other issues against the Company—a range within which rates could be adjusted without impingement on the rights of the parties to litigate the contested issues.

Similarly, in Case 567, we found that "there is no dispute that [the Company] requires rate relief in some amount. Even if we decide all issues adversely to the Company, a rate increase will be necessary." So, it is possible for the Commission to act both swiftly and legally, *i.e.*, without impinging on due process rights. The procedural prison that we have found ourselves in is of our own creation. The issue is simply whether we have the will to break out.

That we have been reluctant to do so demonstrates the level to which regulatory lag has been institutionalized in

this jurisdiction, and our willingness—like the lifer who declines parole—to remain in captivity rather than face the real world. This institutional dependency seems to have intensified over the years; witness our refusal even to hear the case for interim increases in Case 630 in circumstances that were as compelling as those in Case 610, and more than Case 541.

But putting the merits of the case to one side, I do hope that this Commission will soon be seen taking command of its own procedures, perhaps by dividing our cases not into a Phase I/Phase II but into contested/uncontested elements and ruling on the uncontested element within, say, 90 days of initial filing. Thereby, clearly justifiable rate changes could be made in a reasonable time leaving only the contested issues to be resolved at the normal pace of our adjudication. Regulation could, thus, keep pace with reality.

Alternatively, the Commission might adopt procedural reforms that permit a more frequent assessment and reassessment of the results which flow from our orders. For example, we should consider the Annual Review practice of our counterparts in Virginia. Virginia utilities are required to file financial data for the twelve-month period following the test period used in the utility's last rate case. This date is reviewed by the Commission and if it establishes the basis for an interim rate increase one can be granted.

Regulation, it is often said, is a substitute for competition. It is as frequently said that delay is a necessary element of regulation. Depending on trends delay can serve the short-term interest of one or another party to a rate proceeding. In recent years we have observed the very deleterious effects of delay (and other attributes of regulatory lag) upon the financial strength of the utilities we regulate. The consequences of this financial weakness will be visited upon the consuming public in the form of higher

capital costs for years to come, and perhaps even in reduced reliability of service. In the final analysis, I believe the public is better served when regulatory commissions take the long-view of their responsibilities, not the least of which, as the Supreme Court has told us, is to refrain from undermining the financial health of the regulated utilities. Recent history has demonstrated, and I fear the near future will confirm, that our illiberality in responding to demonstrated exigencies have had that effect. Therefore, I recant.

I hope to persuade this Commission, through procedural reforms, to infuse our rate-making with price-responsiveness.

IV.

All of which brings me to the case at hand. The evidence will support a decision either way, depending on whether it is tested against a strict or liberal reading of our precedents.

On the one hand, PEPCO is not totally foreclosed from the capital markets. The Company *can* sell stock, and, having done so, can probably sell bonds, although probably at the peril of a down-rating of those securities. Thanks to prompt action by the Maryland Commision, which has decided two rate cases while we processed one, the financial health of the Company will improve this year, and so there is little danger that it will not meet its public service obligation for lack of cash or credit. Whether or not the Company's rate of return, in the absence of interim rate relief, will be substantially less than reasonable is not really subject to objective debate. So, denial of the interim rate request is a defensible decision—at least in the absence of guidance from the Court as to the reasonableness of our criteria for deciding interim rate cases and the reasonableness with which they have been applied in this case.

A grant of interim relief in some amount would also be defensible. But it would require a philosophical divorce on the Commission's part from the policies that have marked our recent interim rate decisions, especially those of Case 630. The situation now faced by the Company is not, on the surface, as critical as it faced a year ago when trends were adverse and apparently irreversible. Today, trends are at least benign. There is one element of greater urgency now, however. Short-term debt is very high. The debt definitely should be refinanced, and soon. An interim rate increase will bolster cash flow and earnings in the near term, and provide evidence of financial strength that should materially assist the Company's attractiveness to investors. This can only improve the terms upon which the Company enters the capital markets. Performance of the public service obligation will be enhanced if maintenance is restored to optimum levels and deferred transmission and distribution projects can be undertaken in accordance with the schedules originally deemed timely and appropriate. An interim rate increase would enable review of these service-impacting construction and maintenance deferrals. It would increase the possibility that the earned return will approach the level found appropriate by the Commission. On all these bases, an interim rate increase now, four months after the initial filing in this case, is clearly justifiable.

The decision simply reflects the balance on the Commission favoring or disfavoring *timely* rulings in discharge of our obligation to achieve public service objectives through the medium of a financially sound utility. My conviction that the short-term costs to the ratepayers of responsive rate-making in aid of a utility's financial health are repaid in the longer term should be apparent. If there were a majority of the Commission in favor of a grant of interim relief in this case, I would be among its number. But that is not the case.

Nor, in my view, is this an appropriate case for a strong dissent to the denial of interim relief.[10] In the final analysis the justification for interim relief in this case is bottomed on the inadequacy of the rate order in Case 630 to achieve its stated financial objectives. No one desires rectification of the shortcomings of the decision in Case 630 more than I; but correction, if it is to come, will be by the Court. The Commission must be presumed to have understood and intended the consequences of its actions in that case, and atonement by a grant of interim rate relief in this case is not called for.

Conclusion

The issue, as I perceive it, is not one of "interim" or "emergency" or "temporary" rates, and the peculiar metaphysics of their justification. Rather, it is whether we can engage our expertise and our decisional mechanism to act promptly. I have pointed out a procedural path which, if followed, will permit us—in the early stages of a case—to identify and rule on matters affecting a significant fraction of the dollars involved.

The problems posed to us by applications for emergency, temporary or interim rates are born of regulatory lag. If regulatory lag can be brought under control—and it lies with us to do it—its offspring will not rise to vex us.

/s/ W.R. STRATTON

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[10] I do not understand the Commission's denial of interim rates to be tantamount to a finding that the return in prospect is sufficient to assure confidence in the financial integrity of the enterprise, to maintain credit, and to attract capital.

APPENDIX

A. In Case 541, involving this Company, an "Emergency Application for Interim Rates" was filed, the requested rate relief was first denied (Order 5402) and later granted (Order 5419). PEPCO's case for an interim rate increase was described at pages 1 and 2 of Order 5402 as follows:

> "In support of its request for interim rates, PEPCO alleged, in essence, that its need for additional earnings, as detailed in its amended basic application, testimony and exhibits filed May 15, 1969, was of a very urgent nature. It required, said PEPCO, an immediate revenue increase in order to prevent further deterioration of its already unsatisfactory financial condition during the time required to hold hearings and render decision on its amended basic application. It was PEPCO's estimate that "it will be a miracle if a final order is issued by the middle of 1970" on the amended application.[1] Meanwhile, in PEPCO's judgment, its existing inadequate earnings posture would worsen with the passage of time. Continued inflationary increases in the costs of money, fuel and labor would cause a further decline in earnings available for common stock. This, the Company claimed, would make it doubtful that PEPCO could obtain the additional financing required to meet its 1969-1970 capital needs through the sale of common stock on economic terms. Further, it was alleged that any new bond issue would be downrated and marketed at substantially higher interest cost than would otherwise be the case."

Intervenors opposed the application. "Each of these intervenors urged the Commission to conclude that no emergency had been shown to exist in the District of Columbia." Order 5402, p. 2. The staff also concluded that no emergency had been shown which would justify immediate favorable action by the Commission on the application.

The Commission's Order deferring a decision on interim rate relief, rested on the following findings:

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[1] The final order was issued on June 29th, 1970.

"It appears to the Commission that several facts of decisional significance are undisputed on the record of this emergency proceeding. First, when a weighted rate base is used (which the Commission found proper in the last PEPCO rate case) PEPCO's earnings over the past three years have provided the Company with a rate of return slightly in excess of that found reasonable by the Commission. Second, the rate of return earned by PEPCO over these past three years, which reached a high of 6.7% in 1967, has trended downward in 1969 and, if present revenue and expense trends continue, it appears reasonable to expect that this decline will continue. Third, while the precise figure may be subject to debate or differences of expert opinion, PEPCO's cost of debt capital has increased since 1966. Fourth, PEPCO's revenues have been and are sufficient to cover all of its current operating expenses, to pay interest charges on its debt capital, and to pay dividends on its preferred and common stock. Fifth, there is no showing that PEPCO at this point in time would be unable to attract the additional capital necessary to meet its 1969-1970 plant expansion needs." Order 5402, pp. 2, 3.

from which the Commission concluded:

"On these facts, it appears to the Commission, therefore, that PEPCO could not be found from an operating standpoint to be confronted at this time with an emergency situation requiring immediate rate relief. It appears rather that the emergency alleged is a potential difficulty in raising needed capital on the most favorable terms. This not to minimize the importance of considerations of this nature. This Company like all electric companies, is facing a period of unprecedented growth, with an attendant need for enormous capital investment. We have a responsibility to those depending upon the Company for service to ensure that the Company is able to raise the capital it needs and raise it on terms that impose the lowest possible cost burden upon the rate-paying public.

"However, in our judgment, this problem does not manifest itself in a need for immediate relief which would justify short-cutting completely the procedural

requirements of the regulatory process. Rather, it is a situation in which both the existence and the degree of any emergency will be determined or influenced by the length of time required to complete hearings and render a decision on PEPCO's basic application."

The Commission went on to say:

"In the Commission's view, this is a close case. Clearly, it would not be in the public interest to deny PEPCO's application at this time, without prejudice to its being re-filed, for example, at such time in the future as PEPCO's earnings are insufficient to meet its payroll. A utility need not prove imminent bankruptcy to justify interim rate relief. As a reasonable rate of return is not a precise mathematical figure, however, so, too, is there an area in which earnings may be somewhat lower than ideal without decending to the emergency level." Order 5402, p. 3.

The application was kept under advisement, the Commission stating that at the conclusion of Phase I[2] of the case, or earlier if evidence warranted it, the need for interim relief would be reviewed in the context of then existing circumstances.

Four months later a portion of the revenue increase sought by the Emergency Application for Interim Rates was granted on the Company's motion, the major difference in the situation being ". . . the completion of the Phase I hearings." (Order 5419, p. 1), which enabled the Commission to reach the conclusion on the basis of a record that PEPCO's ". . . present earnings are inadequate by any reasonable standard . . ." (Order 5419, p. 4). An interim rate increase in the form of a uniform surcharge not subject to refund was granted to produce earnings approximating the lowest rate of return sponsored in the case.

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[2] Until recently the Commission considered rate cases in two phases. In Phase I the cost of service and revenue deficiency, if any, was determined; in Phase II questions of rate design were taken up.

In the order the Commission referred to PEPCO's then inadequate generating capacity, which had led to voltage reductions and brown-outs.

> "It seems clear, therefore, that PEPCO must now obtain and invest substantial amounts of new capital in generation, transmission and distribution facilities. The construction of these facilities is vital for the preservation of adequate and reliable service for customers within the District of Columbia. There is no question on this record but that the cost of capital has increased substantially over the last several years, and that the attraction of capital on favorable terms is today a serious problem for all business enterprises. It is also undisputed that capital costs are higher for those whose growth prospects and earnings potentials are lower than those of enterprises with which they must compete in the money markets.
>
> "Given the facts in this record with respect to PEPCO's declining earnings, and the fact that its present earnings levels are inadequate by any reasonable standard, it is the Commission's opinion that at this time PEPCO would experience considerable difficulty in attracting capital on favorable terms. This is not to say that PEPCO would be totally unable to attract the capital needed to finance its needed new construction. We are convinced, however, that the cost of capital to PEPCO would be higher without some immediate improvement in its earnings picture, and that this higher cost of capital ultimately would be borne by District of Columbia ratepayers.
>
> "Since we deem the maintenance of the Company's construction program to be of overriding importance, and since we are aware that the issuance of new securities is necessary in the very near future in order to maintain that program, we feel constrained to act more expeditiously than we would normally do on our conclusion that PEPCO's present earnings levels are inadequte. On balance, therefore, the Commission concludes that authorization of interim rate relief for PEPCO now is fully warranted on the record made in Phase I of this proceeding." (Order 5419, pp. 5, 6)

The Commission added in a footnote:

> "The record shows that PEPCO's earnings were sufficient to meet its payroll and other operating expenses, together with interest on its debts and dividends on its preferred stock. . . . We do not believe, however, that these facts, viewed against a background of declining earnings, are persuasive of the view that rates which we have found insufficient should be required to be maintained for such period of time as may be required to complete this proceeding. The Commission has an obligation, as it has previously recognized, to authorize rates that will produce earnings which are fair and reasonable to both the ratepayer of the District of Columbia and to PEPCO. That obligation is not met by agency inaction until payrolls and other current financial obligations cannot be met."

CHRONOLOGY

Formal Case 541 (Potomac Electric Power Company)

2-27-69	Application for increase in rates filed
4-24-69	Public Notice issued
8-5-69	"Emergency Application for Interim Rates" filed
8-11-69	Notice of emergency application published
9-10-69 9-15-69	Public hearings on emergency application
10-27-69	Action on interim rates deferred: Order 5402
12-24-69	"Motion for Order Fixing Temporary Rates" filed
1-28-70	Hearing on motion held
1-30-70	Interim rate increase granted: Order 5419
4-15-70	Phase I Order issued: Order 5429
6-29-70	Final Order issued: Order 5436 (New rates 7-1-70)

Total elapsed time: sixteen months, plus.

B. In Case 567, involving the Washington Gas Light Company, interim rate relief was again first denied (Order 5494) and later granted (Order 5517). Here the utility's "Emergency Application for Temporary Rates" was bottomed on a present insufficiency of earnings to meet the coverage requirements necessary to issue bonds and preferred stock to finance required construction. The Company's rate of return had last been established by the Commission in 1958; the interim rates sought would have resulted in an overall rate of return in excess of that found reasonable in 1958, although—because of the increased cost of senior capital—the return on common stock would not have been as high as authorized in 1958.

All parties recognized the requirement, under 43-408 D.C. Code, for a hearing before a rate change could be ordered.

> "We further have no doubt, however, that we cannot take such action [awarding interim rate relief] without providing an opportunity for a hearing. 43 D.C. Code §408. Any such hearing must, of course, provide all parties with an adequate opportunity to be heard and it must produce substantial evidence of record to support whatever action we take." (Order 5494, p. 5)

This, the Commission stated would preclude immediate action on the emergency applicaton, and the attendant due process obligations would preclude an immediate hearing. Pre-filed testimony and exhibiits were required; time for the other parties to review these filings was required; a hearing on the Company's case was required; further time for the staff and intervenors to prepare and file testimony and exhibits was required; a hearing on the opposing case must be offered perhaps briefs and oral argument were also required. The practical problems of timing and scheduling were wrestled with, see Order 5494, pp. 5, 6.

Six months later, an interim rate increase was awarded in Order 5517, after the record was closed on all issues raised in Phase I of the case. The Company's case for interim rate relief was described at pages 2, 3 and 4 of Order 5517 as follows:

> "In support of its request for interim relief WGL alleges it faces a grave and deteriorating earnings situation, exacerbated by high costs, inadequate rates, and unseasonably warm weather in December, 1971 and at the same time it facts raising considerable capital for 1972 needs. . . . They show the Company would be unable to meet required coverages for either bonds or preferred stock should it seek to raise more than $10 million of senior capital in 1972. And, finally, they estimate that WGL will need $30 million of new capital in 1972. . . .
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> . . . .
>
> "In computing the surcharge, the Company applies an 8% rate of return—the lowest recommended by the staff in the main case—to staff's *pro forma* test year D.C. rate base ($65,468,000) to establish the net utility operating income required. . . .
>
> . . . .
>
> "It believes that interim relief would demonstrate to the financial community that this Commission is aware of the Company's financial condition, thereby shoring up sagging confidence in the Company's ability to generate earnings."

Procedural requirements were more than satisfied, as the Commission noted; and interim rates were granted upon a clear finding of need:

> "First, all procedural requirements have been fully satisfied.
>
> "Second, there is no dispute that WGL requires rate relief in some amount. Even if we decide all issues adversely to the Company, a rate increase will be necessary. Earnings, to cite only one of the many indices of a Company on the decline, plummetted 35%

in 1971. Yet, WGL will require substantial amounts of new capital in 1972 and beyond. However, giving effect to the issuance of $10 million of new bonds or preferred stock WGL's coverage would drop below the ratios set in its First Mortgage and Deed of Trust and its Charter. Hence, WGL is not now in a position to issue $10 million of senior capital.

. . . .

"Where, as here, the record is complete, the need for an increase is undisputed, and the Company's ability to obtain new capital is clearly in question, we think that interim relief is justified. We owe it to those depending on the Company for service to make it plain to those who will be supplying capital to the Company that this Commission recognizes the Company's situation and is prepared to take timely action to deal with it. We are not unmindful, in this connection, that our neighboring Commissions in Maryland and Virginia, which also regulate this Company, have already granted rate increases substantially in excess of the amount we will allow in this Order."(Order 5517, pp. 5, 6)

In reaching a decision on the amount of the interim rate increase, the Commission resolved all rate base, revenue and expense issues against the Company and made a finding on the rate of return to establish the revenue deficiency.

CHRONOLOGY

Formal Case 567 (Washington Gas Light Company)

7-9-71	Application for increase in rates filed
8-17-71	Public Notice issued
12-17-71	Prehearing Conference held
12-22-71	"Emergency Application for Temporary Rates" filed
1-10-72	Hearing set on emergency application: Order 5494

3-20-72	Public Hearing on emergency rate application
3-27-72	WGLCO Memorandum in Support of Emergency Rate Application filed.
4-24-72	Public Hearing on emergency rate application filed
5-1-72	WGLCO advises Commission of willingness to file bond for refund of revenues collected under temporary rate order.
6-26-72	Interim rate increase granted: Order 5517
8-2-72	Phase I Order issued: Order 5522
10-26-72	Phase II Order issued: Order 5542 (New rates 11-1-72)

Total elapsed time: sixteen months, plus.

C. Formal Case 568, also involved PEPCO. There, five months after the initial filing, and after the Company's case had been heard, an application for an interim rate increase was filed by the Company. The Commission, in issuing its Phase I Order in the case five months later (Order 5509), denied the application for interim relief. This order recognized a requirement for increased revenues of more than $12 million dollars, but nevertheless denied the requested interim relief without a hearing on three bases: First, that the Company had not demonstrated its need for rate relief to be so urgent or critical as to warrant "the extraordinary action of an interim increase."[3]; second, that rate design issues were still to be determined and that a uniform surcharge to afford revenue while the case progressed to its conclusion could be inconsistent with the rates of increase ultimately imposed upon the several classes of customers; and third, the Commission's expressed

[3] Order 5509, p. 22. There is no discussion of the Company's evidence on this point.

doubt of its authority to authorize an interim rate increase subject to refund.[4] The final rate order was issued ten weeks later.

CHRONOLOGY

Formal Case 568 (Potomac Electric Power Company)

7-12-71	Application for Increase in Rates filed
8-11-71	Public Notice issued
9-23-71	Prehearing Conference
12-2-71	"Application for Interim Rates" filed
5-9-72	Phase I Order issued: Order 5509 (Interim rate application denied)
7-28-72	Final Order issued: Order 5521 (New rates 8-1-72)

Total elapsed time: twelve months, plus.

D. Next came Formal Case 570, in which C & P Telephone Company was the applicant. This case was filed in August 1971, and Phase I hearings were held in early 1972. On June 30, 1972, the Company filed a Motion for Interim Rate Relief. This motion was denied without hearing in the Phase I Order (5518) which was issued six days later. The Company had asserted itself to be in a ". . . . current emergency financial situation." The Commission found C & P's condition to be more "closely analagous" to that of PEPCO's in Case 568 (where interim rate relief had been denied two months previously in Order 5509), than to Washington Gas Light Company's in Case 567 (where interim rate relief had been granted 10 days before in Order 5517). That is to say, the Company did not ". . . . show a need for rate relief so urgent and critical as to warrant the

[4] This doubt was resolved in favor of our authority to do so five weeks later in Order 5517 in Case 567.

extraordinary action of granting an interim increase." Order 5518, p. 21.

The Commission declined to order rates into effect which would produce the revenues found to be required in Phase I ($13 million dollars in this case) until the Phase II proceedings had been concluded.

C & P tried another approach a week after Order 5518 was issued, when it moved the Commission to order into effect immediately the rates filed by the Company to recover the revenue deficiency found by the Commission in Order 5518. This motion was also denied without hearing on the same grounds, the Commission going on to point out that implicit in the division of a rate case into two phases is a lapse of time between a finding of a revenue deficiency in Phase I and the Phase II order establishing rates to overcome the deficiency. The Company had agreed to bifurcate the proceedings and would not be heard to complain of the inherent delay.

CHRONOLOGY

Formal Case 570 (The Chesapeake & Potomac Telephone Company)

8-31-71	Application for Increase in Rates filed
9-3-71	Public Notice issued
10-27-71	Prehearing Conference
6-30-72	"Motion for Interim Rate Relief" filed
7-6-72	Phase I Order issued: Order 5518 (Interim rates denied)
7-13-72	"Motion to Order Immediate Effectiveness of Rates" filed
8-2-72	Final Order issued: Order 5523 (Motion for immediate effectiveness of rates denied) (New rates 8-3-72)

Total elapsed time: eleven months, plus.

E. Formal Case 595 also involved The Chesapeake and Potomac Telephone Company. This case was filed on April 19, 1973. The final Phase I Order was issued in April 1974. Meanwhile, in February, 1974, the Company had moved the Commission for immediate, temporary rate relief subject to refund. The Commission denied this request without hearing in Order 5636, issued simultaneously with the Phase I Order, which found a revenue deficiency of $8 million dollar. The Commission found no convincing showing or urgent need, and again declined to award temporary rate relief on the sole basis that a revenue deficiency had been determined.

Some new arguments were pressed in this case. The Company alleged a continuing failure to achieve Commission-authorized rates of return since 1968, and emphasized the protracted nature of proceedings in the case, both to date and anticipated. Responding, the Commission rejected the argument that failure to earn at an allowed rate of return is tantamount to confiscation or other cause warranting immediate remedy. The need for time to develop an adequate record in rate cases was pointed out, along with the requirement of protection of the procedural rights of the parties. Finally, the Commission stated that dealing with the Company's request (which presumably would have required separate hearings on the issue of whether circumstances justifying an immediate rate increase existed) would delay Phase II Hearings and, hence, the final order in the case. The Commission suggested that new rates would be authorized just as fast if Phase II went forward normally. Complexities arising from the surcharge/refund approach to interim rate making when rate design was hotly contested were also discussed.

The Company applied for reconsideration of Order 5636 and on May 10, 1974, in Order 5644 the Commission granted a unique form of rate relief to the Company. While

adhering to its decision not to grant an immediate rate increase, the Commission—acknowledging that Phase II of the case would be protracted[5]—determined to calculate the revenue shortfall from that date to the completion of the case and to impose a surcharge to make up the shortfall upon the permanent rates finally authorized. This would insure actual revenues to the Company (albeit deferred) from the customers whose rates were in fact increased as a result of the case, and in proportion to their increases. The Commission recognized that heed would have to be given, in a case that had already been pending for thirteen months, to the extraordinary protraction of the proceedings and its effect on the Company's financial health.

> "On the other hand, we are mindful that the Company has already suffered lengthy and unavoidable delays during Phase I of the case; that it is presently unable to charge rates at the level prescribed in Phase I; and, that it now faces an additional time period for the processing of Phase II. It is, of course, impossible to avoid regulatory lag completely; the rate of return which we have prescribed for the Company reflects the normal risk occasioned by the necessary delay in processing rate applications. However, this case has been subjected to unusual delay. Our determination of the revenue requirements in Phase I was delayed by the requirement of compliance with Section 10(d) of the D.C. Administrative Procedure Act, D.C. Code, Section 1-1509(d), which required us to issue Proposed findings. This delay was compounded by the nature of the rate structure proposed by the Company in Phase II, which made it apparent that completion of this phase will be more prolonged than we had anticipated.
>
> "Faced with unusual delays in both Phase I and Phase II in this case, we feel obligated to provide some method of mitigating the revenue impact on the Company which is fair to the other parties and to the rate-payers." Order 5644, pp. 4, 5.

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[5] It was; the final order in the case was not handed down until February 18, 1975, ten months later.

For the first time, counter measures to the effects of regulatory lag were taken.

CHRONOLOGY

Formal Case 595 (The Chesapeake & Potomac Telephone Company)

4-19-73 Application for Increase in Rates filed

5-16-73 Public Notice issued

6-11-73 Prehearing Conference

1-25-74 Proposed Phase I Order issued: Order 5673

2-6-74 "Motion for Immediate Temporary Rate Relief Subject to Refund" filed

4-5-74 Motion for temporary rates denied: Order 5634

4-15-74 Application for Reconsideration of Order 5636 filed

5-10-74 Rate relief through future surcharge granted: Order 5644

2-19-75 Final Order issued: Order 5690 (New rates 2-1-75)

Total elapsed time: Twenty-two months.

F. Simultaneously, PEPCO had returned to the Commission with an application for higher rates. Case 596 was commenced on April 30, 1973. This case was processed expeditiously with the final Order (5617) being issued on December 3, 1973, seven months after the initial application. No request for interim or emergency rates was filed.

CHRONOLOGY

Formal Case 596 (Potomac Electric Power Company)

4-30-73 Application for Increase in Rates filed

5-14-73 Public Notice issued

6-5-73 Prehearing Conference

11-16-73 Phase I Order issued: Order 5614

12-3-73 Final Order issued: Order 5617 (New rates 12-8-73)

Total elapsed time: Seven months, plus.

G. The Washington Gas Light Company's next case (Formal Case 610) was filed on January 11, 1974. This case commenced with an "Emergency Application for Temporary Rates," which sought a uniform surcharge, subject to refund, to produce revenues sufficient to achieve the rate of return established fourteen months previously in Case 567. The Company promised an application for a permanent rate increase "within the next few months." Notice was promptly issued and a prehearing conference on the emergency application was held on February 1st.

The Company's case for immediate action to authorize temporary rates was based on earnings of 5.19% in the twelve months following Case 567, in which an 8.23% rate of return had been authorized. The causes were alleged to be: inflation, which raised expenses; conservation, which limited sales; and gas supply shortages, which prohibited growth of the revenue base thus limiting the source of revenue growth to higher rates.

The Company stated a requirement to raise $32.5 million in external capital in the year to come, and brought to the Commission's attention the inequity of selling stock at deep discounts from book value (the Company's stock was then selling for 30% below book value) and the prospect of de-rating of its bonds and preferred stock if such securities were offered for sale in the Company's present financial condition. The actual impossibility of selling preferred stock or bonds if required interest or dividend coverages were not obtained was noted, and it was alleged that in the

absence of immediate upward rate revisions these coverages would sink below required levels very soon. Indeed, it was averred that, as of the moment, bond interest coverage was already below the requirement.

The Company urged prompt action on its emergency request, pointing out that if increased rates were to be translated into improved financial results they would have to be authorized during the winter heating season when most of the Company's sales occur. Consumer protection, it was insisted, inhered in a provision for accounting and refund of any amounts collected by the Company in excess of the rates finally determined by the Commission to be reasonable and fair.

The staff contested the basis upon which the Company calculated its earnings, and put in issue five major expense items and a rate base issue. Calling attention to Commission precedents, the staff also noted that a hearing was necessary[6], that procedural protection for the public was required, and that facts and circumstances justifying departure from the normal procedural course of a rate-making proceeding must be shown. The staff indicated that preparation and hearing of the contested issues would mean that a record upon which a decision could be made could not be developed within less than three months, which would reduce the revenue producing potential of a rate increase because it could not come before the heating season had ended. Meanwhile the Company announced a cutback in its 1974 construction budget[7], thus reducing its capital requirements and the urgency of restoring the financial indicators to a level sufficient to permit issuance of senior securities.

The Commission denied the requested rate adjustments in its "Interim Order" of February 14th, Order 5627, which

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[6] Presumably an evidentiary hearing.

[7] It is not clear why this action was taken.

discussed the issues raised by the emergency application in the following language:

> "We have carefully reviewed and considered the presentations made to us in the Emergency Application for Temporary Rates by WGLCO. and as a result have concluded that a *prima facie* showing of the type required for the Commission to take extraordinary action requested was not made. Moreover, if we were to hold an expedited hearing of the type required to resolve the factual issues raised by the staff, we are convinced that any action on our part, assuming WGLCO. proves its case, would come too late to be meaningful. Furthermore, it would be followed at an early date by a second more detailed and comprehensive presentation of the promised request for higher permanent rates.
>
> "As stated in our Order No. 5494, released January 10, 1972, in Formal Case No. 567 ". . . we cannot take such action [a grant of interim rate relief] without providing an opportunity for hearing. 43 D.C. Code Section 408." Furthermore, in light of the serious issues raised by the Staff, such hearing would necessarily be detailed and time-consuming. We also observe that there is no allegation nor any proffered proof herein that failure to act within the time frame requested by WGLCO. will result, for example, in an inability to pay interest, preferred or even common stock dividends.
>
> "WGLCO. has suggested that the Commission grant the emergency rate increases it seeks subject to refund. Such action, it argues, would safeguard the ratepayers while permitting the Company the prompt, upward rate adjustment it needs. It is true, as the Company claims, that revenues found to be allowable, but lost by virtue of delay in the regulatory process, are never realized. A method of overcoming this effect of regulatory lag is to permit a rate increase to take effect during the pendency of a rate case, but subject to refund or other adjustment depending on the outcome of the case. This we have done in appropriate circumstances; see our Order No. 5517, for example. As we have noted in previous cases, our controlling

statute does not confer affirmative authority to use the techniques of refundable increases. Thus, any disposition to do so is tempered by the caution with which this body has historically used its implied powers. In this case there has been an insufficient showing by the Company of an emergency which would justify relaxing the procedural safeguards we have accorded ratepayers before granting interim or emergency rate adjustments. In the absence of such showing we have not addressed the question whether the refundability approach would compensate for the relaxation of those procedural safeguards.

"To sum up then, we find that:

"(a) The filings give rise to substantial factual and legal issues which would have to be resolved on the basis of an evidentiary record, to be followed by either briefs or oral argument;

"(b) Even the most expedited hearing could not be concluded promptly enough to give meaningful interim relief to WGLCO;

"(c) No showing has been made of such dire need as to require extraordinary action by the Commission."

"WGLCO can be assured that it will be allowed whatever rate relief the record on its application for permanent rate shows it is entitled to receive, and that we will act expeditiously on any such application filed. We feel that the financial community, the shareholders and others are given ample evidence of our intention to act promptly by holding the current docket open for further motions properly supported; by permitting WGLCO to file its application for permanent rates in this docket; by retaining the current intervenors as intervenors in the permanent increase case; and by instructing our staff to proceed with the preparation for hearing on the permanent application as promptly as possible." Order 5627, pp. 5-7.

The Company filed its application for permanent rates in late March. This was followed by an "Application for Temporary Rates" on May 20th in which it was alleged that the Company's deteriorating financial condition

threatened to jeopardize its ability to continue to provide adequate service. The Company urged rapid affirmative action by the Commission on the interim surcharge request in order to ameliorate the earnings decline and forestall further erosion of the Company's financial strength while the permanent rate case wound on.

By June 6th, when a prehearing conference was held, the staff's analysis had proceeded to the point where the staff was prepared to acknowledge an entitlement to both permanent and interim rate relief. Some of the intervenors agreed.

The Commission scheduled a hearing on the temporary rate application, prior to which the staff distributed testimony recommending certain adjustments and disallowances in the Company's financial evidence. The hearing was duly held, and the Company demonstrated a steady decline in earnings to a level well below its common stock dividend requirements, an achieved rate of return of only about half the last previously authorized rate, a requirement for substantial external capital within the next 18 months to refinance a maturing bond issue and meet construction program needs, and a need to rebuild preferred dividend and bond interest coverages within the next nine months in order to make possible the sale of the securities issues required in 1975 (coverages had been below required levels for five months, and would continue to decline in the absence of rate relief).

The staff testified that the Company's current earnings level was so deficient as to warrant immediate, interim rate relief pending final disposition of the application for new, permanent rates. For purposes of the temporary case the Company acquiesced in the staff's recommended adjustments and waived cross examination. Thus all doubtful items in issue were resolved against the Company; some matters were not put in issue in the interim case—*e.g.*, rate of return, jurisdictional allocation.

In order 5655 the Commission granted an interim rate increase. We found the earned return of 4.5% to be substantially less than just and reasonable. Coverages below par and declining also evoked concern:

> ". . . . of perhaps equal significance is the matter of coverages. As noted above, since February 1974, bond coverage has been below the level required in order to issue additional long term debt and has continued to decline. Likewise, preferred stock coverages have been, since February 1974, below the level required in order to issue additional preferred stock. Clearly, we should not permit such a situation to continue with its concomitant impact on the ability to obtain additional capital, and the adverse impact which it might have on the rating of the Company's bonds. In this connection, the evidence shows that with the temporary rate level authorized to the Company by the Maryland and Virginia Commissions, together with the temporary rate relief recommended by our staff witness, the Company should be able to meet its coverage requirements early in 1975, so that it should be able to accomplish its 1975 project financing." Order 5565, pp. 9, 10.

CHRONOLOGY

Formal Case 610 (Washington Gas Light Company)

1-11-74 "Emergency Application for Temporary Rates" filed

1-17-74 Public Notice issued

2-1-74 Public Hearing on emergency application

2-14-74 Emergency application denied without prejudice: Order 5627

3-29-74 Application for Permanent Rate Increase filed

4-29-74 Prehearing Conference

5-20-74 "Application for Temporary Rates" filed

7-1-74 Public Hearing on application for temporary rates

7-11-74 Proposed and Final Interim Orders issued: Orders 5655, 5656 (Temporary rates 7-24-74)

1-31-75 Final Order issued: Order 5686 (New rates 2-1-75)

Total elapsed time: Twelve months, plus.

H. Formal Case No. 630, Potomac Electric Power Company. The interim rate increase issue was presented twice in PEPCO's most recent rate case, filed December 1974. Company applications were twice dismissed without hearing, Order 5707 (April 1975) and Order 5725 (July 1975).

The first application for an interim rate increase was filed some three months after the case had commenced. The Company alleged a steep decline in earnings, which had persisted for nine months and which was projected to continue until final action was taken on its permanent rate increase application. With the earnings decline was associated an ever-diminishing coverage of interest and dividend requirements of the Company's bonds and preferred stock. The danger to ratings and marketability of the Company's securities posed by its deteriorating financial condition was emphasized. Delay by the Commission in moving its permanent rate application was also criticized.[8] The Company claimed to have resolved all possible controversial issues against itself in calculating the amount of interim rate relief sought, and advanced the familiar claim that ratepayers would be adequately protected through a provision for accounting and refund of any amounts col-

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[8] The prehearing conference was deferred more than once to permit participation by the Commissioner-designate and the People's Counsel.

lected in excess of what might finally be awarded in the case. The interim rate application was opposed by several intervenors.

In order 5707 the Commission reviewed some of its prior orders in the language which follows:

> "Since 1969, the Commission has issued a series of decisions dealing with the question of interim or "emergency" relief. We believe that it is appropriate at this time to restate and briefly discuss the common principles set forth in our earlier decision.
>
> "There is a heavy burden upon the Company to allege and establish the existence of circumstances which warrant departure from the normal ratemaking process. This principle was stated in *Washington Gas Light Co.*, Order No. 5517, at page 5, dated June 26, 1972. This burden is imposed upon the Company, in order to justify an interim proceeding, which by its very nature tends to the usual procedural rights afforded to the other parties in the normal ratemaking process. Further, the courts have held that where circumstances exist which warrant interim relief, the regulatory body may not be required to make the full and complete findings on the record which might otherwise be required of it in the case-in-chief, *Payne* v. *WMATC*, 415 F.2d 901, 907 (1968). The central issue, then, is to identify those factors and circumstances, which the Company faces, that are so critical that they justify the possible abridgement of the usual procedural rights of the parties and justify administrative action on what might be otherwise considered to be a less than adequate record.
>
> "A review of our previous decisions indicates such circumstances as: (1) a present or clearly imminent threat that the Company will be unable to continue meeting its public service obligation and, (2) a present or clearly imminent threat that the Company will be unable to obtain necessary capital funds [to finance the construction of necessary new or replacement plant,] see *Re Potomac Electric Power Company*, 82 PUR 3rd 209, (1970), *Washington Gas Light Company*, Order No. 5517, at page 6, *Washington Gas Light Company*, Order No. 5655, at pages 9-10 (July 11, 1974). We would also add that earnings which produce a rate of return substantially less than that which is reasonable may warrant consideration of interim relief. However, the mere failure of a Company to realize a previously authorized rate of return or a Phase I finding by the Commission that the existing rate of return is less than reasonable is not sufficient in and of itself to warrant interim relief. See *Potomac Electric Power Company*, Order No. 5509, at page 22, May 9, 1972. Neither is the allegation of *potential* difficulty in raising needed capital on the most favorable terms adequate, in and of itself to justify relief, see *Potomac Electric Power Company, Order No. 5402, at page 3, October 27, 1969.*" Order No. 5707, pp. 2, 3.

We proceeded to measure the Company's financial situation as adduced by the pre-filed testimony of its financial vice-president against the requirements implicit in the common principles stated above, and found it wanting. In the final analysis the Company had not even claimed that certain financial catastrophe was immediately in prospect, to say nothing of advancing evidence from which the Commission could reach that conclusion independently. Precarious and worsening the Company's condition was, but at the brink it was not.

The Commission dealt straight—not forwardly with the regulatory lag issue.

> "The PEPCO interim increase application appears to be essentially a restatement of the reasons advanced in support of the permanent increase request, supplemented only by the assertion that because of regulatory lag, PEPCO has now abandoned hope of permanent rate relief by mid-1975. We are aware of no reason, and the interim application suggests none, on the basis of which the Commission could now conclude that significant and unanticipated changes in PEPCO's financial and operating condition have occurred since the filing of the permanent increase application, changes which would warrant granting

PEPCO approximately one-half of its permanent increase request some two to three months in advance of the time that PEPCO itself had anticipated decision on its permanent request." Order 5707, p.4.

There were other impediments to prompt action on the interim application, even if the first hurdle had been surmounted.

> "Moreover, while the PEPCO assertion that it has resolved all controversial issues against itself would, if true, permit the briefest of hearings, the Commission's own review of the pending PEPCO application and pleadings filed with respect thereto suggest that the case now before the Commission may well involve issues not presented in the last PEPCO case. We may note, parenthetically, that even as to issues presented in that case, the principle of *res judicata* has no applicability. Furthermore, the Commission cannot assume that the rate of return determination made in that case remains appropriate today. It must, as we understand the law, base its determination of a fair rate of return on evidence of record with respect to the time period involved." Order 5707, pp. 4, 5 (footnotes omitted).

The interim application was dismissed without hearing, the Commission stating in the final paragraphs of Order 5707:

> "Standards which we believe must be met in order to justify interim relief, have been clearly defined in previous cases before the Commission, some of which have been cited herein. In essence, those standards require a showing of either the existence or the impending existence of an "emergency." By emergency we mean a set of circumstances which threatens the ability of the Company to meet its public service obligation and/or threatens its financial integrity. We have measured the Company's allegation against these standards and have concluded that the Company has failed to allege circumstances, which, if proven, would establish a *prima facie case* justifying interim relief.

> "While we are fully aware of PEPCO's conviction that it needs rate relief at the earliest posible date, we cannot conclude that the mere reiteration of that conviction, coupled with an expression of concern over regulatory lag and reemphasized projections of possible future financial difficulties, are sufficient grounds for the Commission to adopt or approve the short cuts in proper regulatory procedure and due process requested by PEPCO in its interim application."

Undaunted, the Company tried again in July. An application for an emergency interim increase was filed with supporting testimony on July 3rd and dismissed by the Commission a week later. In Order 5725 we stated that, "We find no significant change in circumstances over these which existed at the time of issuance of Order No. 5707. Essentially, the same factors were operating at that time as are alluded to in the instant application; namely, a declining coverage ratio for fixed charges, which, nevertheless, still remains above the minimum level required; a market price for the Company's common stock which is below its book value but still in excess of its par value; and voiced uncertainty regarding the ability of the Company to obtain necessary financing in the last quarter of this year. No imminent threat exists regarding the Company's ability to satisfy its public service obligation. There is no present or clearly imminent threat that the Company is or will be unable to obtain necessary capital funds (see Order No. 5707 at p. 3). The Company is not precluded in fact, at this time, from seeking additional long-term financing (in the form of either long-term debt or common stock). Here, as in the case of its prior request for interim relief, what is alleged is a potential difficulty which may or may not materialize.

We also note that we are nearing the conclusion of the case-in-chief. We find no basis in the Company's application to warrant departure at this time from normal regulatory processes—especially when this proceeding is nearing its conclusion.

CHRONOLOGY

Formal Case 630 (Potomac Electric Power Company)

12-20-74 Application for Increase in Rates filed

1-9-75 Public Notice issued

3-12-75 Application for Interim Rate Increase" filed

4-7-75 Interim rate application denied: Order 5707

5-6-75 Prehearing Conference

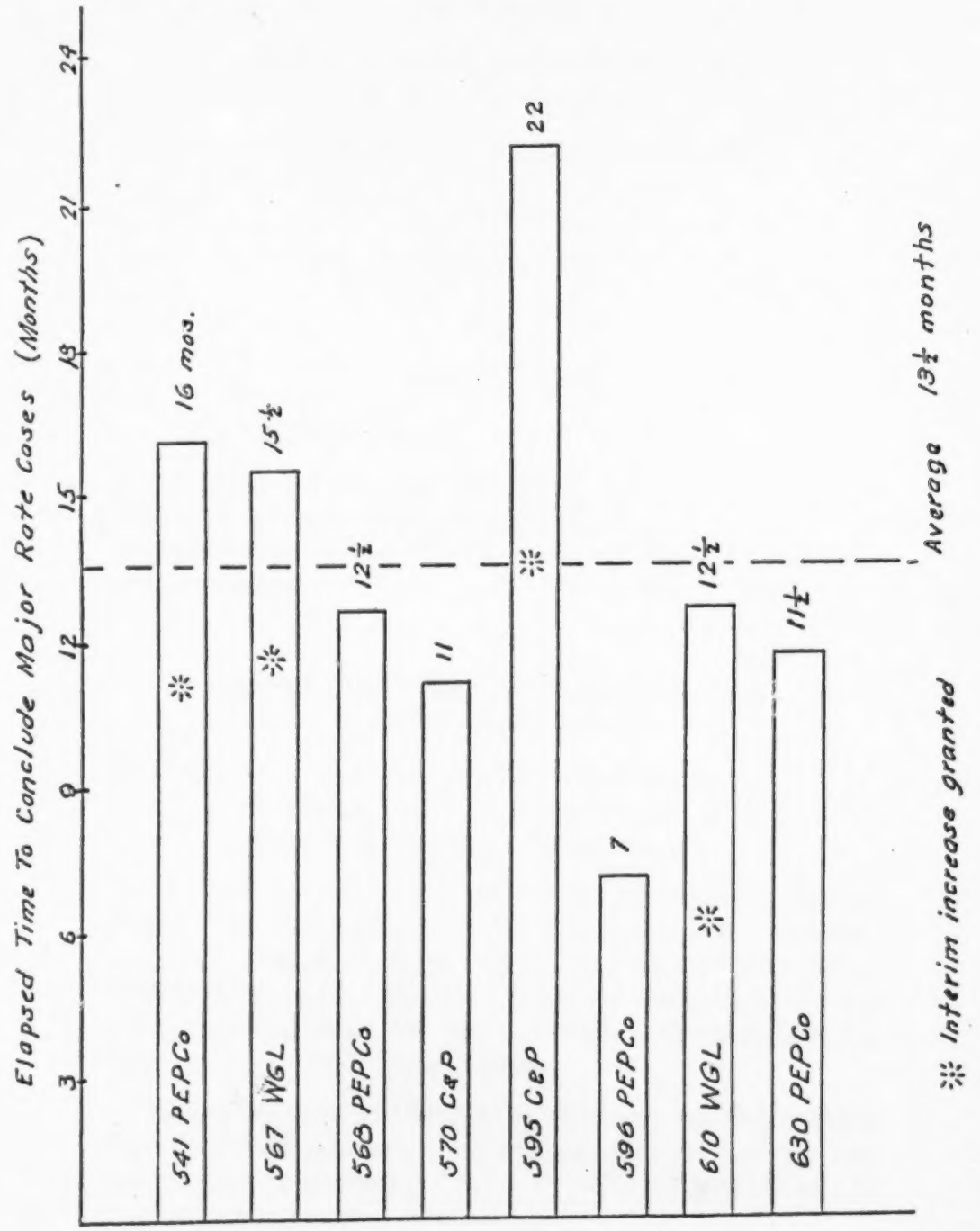
7-3-75 "Application for Emergency Interim Rate Increase" filed

7-11-75 Emergency interim rate application dismissed: Order 5725

11-12-75 Final Order issued: Order 5739

12-12-75 Final Order issued: Order 5748 (New rates 12-13-75)

Total elapsed time: Twelve months, minus.



APPENDIX B

PUBLIC SERVICE COMMISSION OF THE
DISTRICT OF COLUMBIA

1625 I Street, N.W., Washington, D.C. 20006

MAY 17, 1976

Order No. 5791

IN THE MATTER OF

Application of POTOMAC ELECTRIC POWER COMPANY For an increase in its retail rates for the sale of electric energy	))))	Formal Case No. 651

ORDER DENYING APPLICATION FOR RECONSIDERATION

BEFORE: Ruth Hankins-Nesbitt, Chairperson
H. Mason Neely, Vice Chairman
William R. Stratton, Commissioner

On April 29, 1976, Potomac Electric Power Company (Pepco) filed an Application for Reconsideration of Order No. 5782 (issued April 26, 1976). Also on that date Pepco filed a "Motion for Expeditious Reconsideration of its Application." On May 10, 1976, People's Counsel filed an Opposition to Pepco's Application.

Having considered Pepco's Application, we find nothing therein which persuades us to disturb the findings and conclusions contained in Order No. 5782. THEREFORE, IT IS ORDERED:

The application of Potomac Electric Power Company for Reconsideration is hereby denied.

A TRUE COPY: By direction of the Commission:

/s/ MARY E. BRAZELTON
Mary E. Brazelton
Executive Secretary

Chief Clerk

APPENDIX C

DISTRICT OF COLUMBIA
COURT OF APPEALS

JANUARY TERM 1979

No. 10909

POTOMAC ELECTRIC POWER COMPANY,
Petitioner,

v.

THE PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA,
Respondent,

PEOPLE'S COUNSEL,
Intervenor.

Petition of Appeal of an Order of the Public Service Commission of the District of Columbia

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(Argued October 5, 1976 Decided March 16, 1979)

BEFORE: Reilly, Chief Judge at the time of oral argument, and Nebeker and Mack, Associate Judges.

Memorandum Opinion And Order

This case is before us on a petition by Potomac Electric Power Company (PEPCO) for review of an order of the Public Service Commission denying an application for an

interim rate increase designed to raise approximately $24,000,000 more in annual revenues. Such application was filed on the same day, December 29, 1975, as an application for a permanent rate increase estimated to bring in an additional revenue of some $57,000,000.

Just prior to the submission of these applications, the Commission had granted a rate increase, but one calculated to produce only $27,700,000 in added revenue, thereby in effect rejecting PEPCO's contention that it needed an increase designed to raise $50,800,000 in order to compensate the utility for the rising costs of operation. Deeming itself aggrieved by this action, PEPCO moved unsuccessfully for reconsideration and filed the two applications to which we have referred. While these were pending before the Commission, PEPCO also challenged the 1975 order in a petition for judicial review.[1]

The application for interim relief was denied in April 1976, and is the subject of the instant petition. Shortly after this case was argued here, the Commission acted upon the second application, and in an order published in December 1976, granted PEPCO $29,400,000 in rate relief, effective the following year. The Commission then filed a motion in this court to dismiss as moot the PEPCO petition directed at the denial of interim relief.

We see no reason for not acting favorably upon the Commission's motion, for in our opinion, its subsequent order providing a permanent rate increase made the merits of its prior rejection for temporary relief academic. It may be, of course, that PEPCO regards the rate increase specified in the Commission's order in December 1976, inade-

[1] A division of this court found the challenged order so deficient as to be confiscatory and remanded the case to the Commission for modification of its order. This judgment, however, was vacated by the court en banc, which granted a motion for rehearing. *See Potomac Elec. Power Co.* v. *Pub. Service Comm.*, D.C.App., 380 A.2d 126 (1978).

quate—we note the relief ultimately given was substantially below what the utility had sought—but its avenue for redress, if legally aggrieved under the terms of D.C. Code 1973, § 43-706, is a petition for a review of that order—not the earlier one.

Because some of the issues dealt with in the interim relief order will probably recur, we are not necessarily compelled to dismiss the pending petition, *Southern Pacific Telephone Co.* v. *Interstate Commerce Commission*, 219 U.S. 498, 514-16 (1911); but because temporary rate relief cannot be granted retroactively, it appears that even assuming PEPCO was improperly denied its request, no practical remedy could be granted in this case.[2]

What we have before us does not differ basically from an appeal from the denial of a temporary restraining order or a preliminary injunction. While such interlocutory orders are appealable, it is generally taken for granted that if a permanent injunction is entered during the pendency of the appeal, such appeal is mooted. We think the rate increase order of December 1976 had the same effect. Accordingly, it is

ORDERED and AJUDGED that the petition for review is hereby dismissed.

PER CURIAM.

FOR THE COURT

/s/ ALEXANDER L. STEVAS
Alexander L. Stevas
Clerk

[2] *See Democratic Central Committee* v. *W.M.A.T. Comm.*, 158 U.S.App.D.C. 7, 44-45, 485 F.2d 786, 823-24 (1973); *Alton & Southern Railway* v. *I.A.M.*, 150 U.S.App.D.C. 36, 41-42, 463 F.2d 872, 877-78 (1972).

APPENDIX D

DISTRICT OF COLUMBIA
COURT OF APPEALS

MAY 8, 1979

No. 10909

POTOMAC ELECTRIC POWER COMPANY,
Petitioner,

v.

THE PUBLIC SERVICE COMMISSION OF
THE DISTRICT OF COLUMBIA
Respondent,

PEOPLE'S COUNSEL,
Intervenor.

BEFORE: Newman, Chief Judge; Kelly, Kern, Gallagher, * Nebeker, Harris, * Mack, and Ferren, Associate Judges; * Reilly, Chief Judge, Retired; and Yeagley, Associate Judge, Retired.

ORDER

On consideration of petitioner's petition for rehearing or rehearing en banc, and it appearing that no judge of this Court has called for a vote thereon, it is

ORDERED by the merits division that petitioner's petition for rehearing be denied; and it is

ORDERED by the merits division that petitioner's petition for rehearing be denied; and it is

FURTHER ORDERED that the en banc petition be denied.

PER CURIAM

Supreme Court, U. S.
FILED
OCT 1 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-154

POTOMAC ELECTRIC POWER COMPANY,

Petitioner,

v.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA, PEOPLE'S COUNSEL OF THE DISTRICT OF COLUMBIA,

Respondents.

BRIEF IN OPPOSITION FOR PEOPLE'S COUNSEL

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DI CESARE - Printing — 331-6101 — Washington, D.C. 20006

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POTOMAC ELECTRIC POWER COMPANY,

Petitioner,

v.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA, PEOPLE'S COUNSEL OF THE DISTRICT OF COLUMBIA,

Respondents.

BRIEF IN OPPOSITION FOR PEOPLE'S COUNSEL

Respondent, People's Counsel of the District of Columbia,[1] respectfully prays that the Petition for Writ of Certiorari in this matter be denied, for the reasons set forth herein.

[1]The People's Council was established by D.C. Code 1977 Supp., §43-205, as an office within the District of Columbia Public Service Commission, to represent and protect the interests of consumers in matters under the jurisdiction of the Commission.

Respondent, People's Counsel of the District of Columbia, respectfully prays that the Petition for Writ of Certiorari in this matter be denied, for the reasons set forth herein.

OPINIONS BELOW

Respondent People's Counsel concurs in the statement made by the petitioner Potomac Electric Power Company on this matter.

JURISDICTION

People's Counsel concurs in the statement made by the petitioner Potomac Electric Power Company on this matter.

QUESTION PRESENTED

Should certiorari to the District of Columbia Court of Appeals be granted because that court dismissed as moot an appeal from a Public Service Commission order denying interim rate increases of approximately $24 million to a utility, when the company does not contend that it met the criteria for interim rates, when those criteria are generous to the utility, and when the whole issue is rendered hypothetical by a subsequent commission order authorizing a permanent rate increase of more than $29 million?

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section 2, Clause 1 of the Constitution of the United States:

> The judicial Power shall extend to all Cases, in Law and Equity, under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime jurisdiction; — to controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States, — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT OF THE CASE

Petitioner Potomac Electric Power Company (hereafter "PEPCO" or "the Company") is a public utility and is subject to the jurisdiction of the District of Columbia Public Service Commission (hereafter "the Commission"). PEPCO applied to the Commission for an interim rate surcharge designed to produce an increase in revenues of $23,938,000 on an annual basis. This application was filed on December 29, 1975 simultaneously with a request by PEPCO for a permanent increase in rates designed to obtain additional revenues in the amount of $52,324,000 from the Company's D.C. customers. These applications

were filed only sixteen days after the effective date for new rates which had just been approved by the Commission, and which were designed to increase the Company's District of Columbia operating revenues by $27,657,000 annually. The Company prepared its request for interim rate relief prior to experiencing the impact of the rates which became effective December 13, 1975 and increases awarded in other jurisdictions which altered the financial picture of the enterprise. The evidence presented on the interim case showed that the Company's financial circumstance had improved from the December 1975 filing date to the March 16, 1976 hearing date. The record showed that the selling price of the Company's common stock, for example, had increased from the $10½-$11½ range, at which it sold about the time of the filing, to $12-⅜, at which it sold on March 15, 1976 (T. 121). The Company's earnings per share, which dropped below its $1.16 dividend rate in 1975, were back up to $1.19 per share for the twelve months ending January 31, 1976 (T. 103), a period only one month later, and, as shown by Moody's Public Utility Manual, were $1.71 per share for 1976. Even without a permanent rate increase from the Commission, the Company projected its ratio of earnings to fixed charges at 2.7 by year-end 1976. According to PEPCO's president, a ratio of only 2.5 is required to continue the Company's A long-term debt rating by Moody's (T. 64).

PEPCO's assertions to the Commission that it would be unable to obtain necessary financing absent interim relief were unfounded. The Company's president and vice president told the Commission under cross-examination

that the Company expected its $200,000,000 in bank lines of credit to be renewed (T. 100, 101, 109, 51); that they could not forecast a downrating from the A+ rating to which the Company's long-term debt had been upgraded by Standard and Poor's in August 1974 (T. 92) if interim relief were not granted (T. 107); that more than 36 companies were downrated between 1974 and 1975, some to triple B by Moody's, which were able to market debt, and that the Company expected to generate virtually all construction expenditures internally (T. 59, 60, 66). Based upon this record the Commission concluded that PEPCO could continue to attract capital and meet its public service obligations. The Commission therefore declined to grant the extraordinary interim rate increase as PEPCO had requested.

PEPCO filed an Application For Reconsideration on April 29, 1976, and after denial thereof, on May 17, 1976, the Company appealed to the District of Columbia Court of Appeals. Meanwhile, the Company's application for a permanent rate increase was pending before the Commission, and was proceeding according to an expedited schedule stipulated by the parties and accepted by the Commission. On December 31, 1976 the Commission issued its decision with respect to PEPCO's permanent rate application, granting $29,400,000 in permanent rate relief, thereby making moot PEPCO's appeal of the denial of interim rate relief. Accordingly, on January 14, 1977, the Commission filed a motion with the Court of Appeals seeking dismissal of the appeal as moot,[2]

[2] The application for an interim increase had sought to augment revenues by approximately $24 million; the decision on a permanent increase granted over $29 million.

which motion was subsequently granted. PEPCO filed a petition for rehearing or rehearing *en banc*, which the Court of Appeals denied in a *per curiam* order on May 8, 1979.

REASONS FOR DENYING THE WRIT

The decision of the Court of Appeals dismissing PEPCO's petition was correct, as the subsequent order of the Commission providing a permanent rate increase to PEPCO rendered the question of temporary relief moot. The District of Columbia Public Service Commission (hereafter "the Commission") establishes permissible utility rates according to the statutory scheme set forth by the D.C. Code 1973, Title 43 (hereafter "the Act"). That statute provides that new rates may take effect only after the Commission has conducted a hearing and issued an order based upon the record in that hearing (Section 43-401). It is a cardinal principle of the ratemaking process that established rates are not intended to *guarantee* a utility a fair rate of return, only the opportunity to earn it. *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 590 (1942). Once rates have been set to produce a fair return, the utility runs the risk of earning a greater or lesser rate of return. If the existing rate structure proves inadequate in producing a fair return, the utility may apply for new rate relief. Until such relief is granted, the utility must continue to charge only the previously authorized rates. During the interim between an application for new rates and a Commission decision after full hearing thereon, the utility bears the risk that revenues earned under the old rates will be inadequate. *Chesapeake & Potomac Telephone Company* v. *PSC*, 330 A.2d 236 (D.C.App.

1974). This fact is underscored by the absence of any express authority in the Act for the Commission to authorize interim rate relief. The Commission's authority to authorize such relief is an implied power only, D.C. Code 1973, Section 43-1003, and for that reason the Court of Appeals of the District of Columbia has admonished the Commission to exercise that power "with restraint." *Chesapeake & Potomac Telephone Company*, *supra* at 243.

The criteria for interim relief formulated by the Commission are as follows:

> (1) [A] present or clearly imminent threat that the utility will be unable to continue to meet its public service obligation; (2) a present or clearly imminent threat that the utility will be unable to obtain capital funds, and (3) that the utility's earnings produce a rate of return substantially less than reasonable.

Commission Order No. 5707 (A.2a).

The facts on the record before the Commission clearly establish that PEPCO failed to meet these criteria. Nor does PEPCO now contend to the contrary. Having failed to meet the established criteria, however, the Company now protests that these criteria are unreasonable as a matter of law or unconstitutional. This argument proceeds upon the erroneous premise that interim relief must be granted to close any gap which exists between the previously authorized rate of return and the Company's projected actual rate of return. This premise is, as we shall show, untenable on its face; moreover, it misinterprets the law and

would amount to the establishment by the Commission of interim relief as a mechanism designed to guarantee a certain rate of return as quickly as the new application can be filed and interim relief considered. This interpretation is completely contrary to the established precepts that regulation does not insure a certain earnings level to a regulated company nor guarantee a certain rate of return. *Federal Power Commission* v. *Natural Gas Pipeline Co., supra* at 747. PEPCO seeks to subvert this principle by asserting its entitlement as a matter of law to an interim "make whole" allowance.

The Commission's established criteria for granting interim rate increases are similar to those adopted by variety of other regulatory commissions,[3] and are fair and reasonable, if not overgenerous. The only constitutional proscription relating to the interests of investors in a utility is that the ratemaking process must give the utility the opportunity to earn a fair return. If the utility fails to realize the return found reasonable, it has the right to petition for new rate relief. It does not follow, even assuming a failure in fact to realize a fair return, that the utility must be granted interim "make whole" relief while an application for permanent rate increase is pending. There is no contrary principle to be found in *Smith* v. *Illinois Bell Telephone*, 282 U.S. 133 (1930), upon which petitioner relies. *Smith*

[3] See *Re Citizens Utility of California*, 89 PUR3d 334 (1971); *Re Public Service Electric and Gas Company*, 6 PUR4th 302 (1974); *Re Indianapolis Power and Light Company*, 88 PUR3d 401 (1971); *Re Wisconsin Michigan Power Company*, 99 PUR3d 519 (1973); *Re Madison Gas and Electric Company*, 10 PUR4th 185 (1975); *Re Michigan Consolidated Gas Company*, 88 PUR3d 168 (1971); *Re Con Ed Company of New York, Inc.*, 10 PUR4th 436 (1975).

stands for the proposition that a state commission cannot establish permanent rates without separating out costs and revenues properly allocable to interstate activity, over which the Interstate Commerce Commission has jurisdiction. The rates which PEPCO could lawfully charge, however, had just been set by the Commission in a previous hearing on the basis of proper cost-of-service and revenue allocations. The denial of an interim increase in these rates did not amount to "setting" rates on a systemwide basis. Rather, the Commission had to establish whether the company was in such desperate straits that emergency measures, outside the statutory process, would be warranted. Whether the circumvention of the statutory process and ordinary method of rate-setting should be suspended in order to avoid dire consequences depends on the Commission's view of the Company's systemwide financial condition. Consideration of systemwide factors in this limited circumstance was within the Commission's authority and did not violate any constitutional prohibition.

Indeed, the basic result for which PEPCO argues is one which would be counter-productive for PEPCO. PEPCO argues that it must be allowed an interim rate increase (not provided for in the statute) if its District of Columbia business is not producing an adequate rate of return. But it is the allocations among jurisdictions and the determination of the validity of the claimed costs that lead to great differences of opinion at hearing. If PEPCO is correct, it would be necessary to have a full determination of the major contested issues in a rate case before it could obtain interim relief; in the time it takes to resolve these issues, the Commission could be acting on the permanent rate increae filing, and avoiding additional delay, detrimental to PEPCO, in authorizing new permanent rates.

What PEPCO really wants is a test which is easier for it to meet. People's Counsel is unable to ascertain from the petition precisely what standard PEPCO urges this Court to impose, as a matter of constitutional law, on the Commission's consideration of interim increases. Apparently the legal argument here is still in its infancy.[4] The Commission's existing test, however, is less harsh than that envisioned by the Supreme Court in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956). Together these cases establish that the (then) Federal Power Commission could not authorize a change in certain rates for gas or electricity except in dire circumstances. The Court ruled that a contract rate is not "unreasonable" just because it is "unprofitable" for the selling utility. The only basis for setting aside contract prices is when such prices "might impair the financial ability of the public utility *to continue its service . . .*" *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., supra* at 355. (emphasis supplied). In other words, the Commission can modify rates only when the jurisdictional rate will force the restriction of all services, jurisdictional and non-jurisdictional. This is analogous to the situation here. While the Commission's test may well be more advantageous to the Company than the statute permits, there is no merit whatever in PEPCO's position on the subject.

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[4] Cf., Shakespeare, *As You Like It*, Act 2, Scene vii.

The Dismissal of PEPCO's Appeal On The Ground Of Mootness By The Court Of Appeals Was Appropriate

Federal judicial power extends only to matters in which an actual case or controversy is involved. Article III, Section 2 limits the jurisdiction of the courts to actual "cases" and "controversies," and there is no power in any court to extend its jurisdiction beyond the constitutionally imposed limits. See, *Marbury* v. *Madison*, 1 Cranch 137 (1803); *Osborn* v. *United States Bank*, 9 Wheat. 738, 819 (1824). The requirement that there be a "case" or "controversy" means that there must be a "real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be . . ." *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240-41 (1937); see also *Muskrat* v. *United States*, 219 U.S. 346, 356 (1911); *Federal Radio Comm'n* v. *Nelson Bros.*, 289 U.S. 266 (1933); *Coleman* v. *Miller*, 307 U.S. 433, 460-64 (1939).

No case or controversy existed between PEPCO and the Commission regarding PEPCO's request for interim relief, once the Commission awarded a permanent rate increase to PEPCO. No "interim" period existed once permanent rates were authorized. Moreover, since the D.C. Code 1973, §43-401 does not permit an award of retroactive rates under any circumstances, the matter no longer was "admitting of specific relief," as constitutionally required. *Aetna Life Ins. Co., supra.*

PEPCO relies on *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498 (1911) in an effort to confer jurisdication

on the Court of Appeals when none would otherwise exist. *Southern Pacific Terminal* recognized an exception to the doctrine that the courts will decide only actual controversies; when a particular defined legal issue is likely to recur, yet will evade judicial review due to its short duration, a court may decide to hear the matter. This exception has no real application to the situation of PEPCO following the Commission's denial of its application for extraordinary interim rates.[5] PEPCO was at that time charging rates which had just been authorized by the Commission, and which were designed to augment its District of Columbia operating revenues by more than $27 million. At the same time, the Commission was proceeding on PEPCO's most recent application for another permanent rate increase. The December, 1975, rate decision by the Commission was of course subject to the full range of

[5] The decision of the Court of Appeals to dismiss the appeal as moot was reasonable, even accepting (which we do not) PEPCO's argument that *Southern Pacific Terminal* applies. The "Southern Pacific Terminal" doctrine merely removes the mandate that the case *must* be dismissed as moot. As the Court of Appeals for the District of Columbia Circuit has observed, ". . . the constitutional power of a court to decide a contention presented on appeal does not define a constitutional duty." *Alton & Southern Railway* v. *Internat'l Ass'n of Machinists and Aerospace Workers*, 463 F.2d 872, 877 (D.C. Cir. 1972). The Court of Appeals decision declining to issue such an opinion was prudent in the circumstances here. PEPCO's complaint was notably dependent upon the specific factual context, and judicial intervention could only have had the effect of disrupting the orderly course of agency disposition.

agency and judicial hearing and review,[6] as was the permanent rate increase order issued in December, 1976, which made the denial of emergency interim relief a moot question. PEPCO's status was precisely that envisioned by the Congress when it enacted Section 43–401 of the D.C. Code, which authorizes utility rates to become effective only *after* a Commission hearing and an order upon the record. It may readily be conceded that PEPCO is highly likely to request interim rate increases in the future without being able to meet the present overgenerous standard set by the Commission or any other legal standard of which People's Counsel is aware, and to seek to appeal the interlocutory orders of the Commission which should deny the relief PEPCO has failed to justify.[7] That unfortunate fact is no justification, however, for seeking to invoke the process of this Court to direct the Courts of the District of Columbia and the Commission to impose, on constitu-

[6] In fact, PEPCO did seek judicial review of the order. The D.C. Court of Appeals, acting *en banc* to reverse a decision by a division of that court upheld the Commission in a decision which is now the subject of another petition for writ of certiorari filed by PEPCO. See No. 79-153.

[7] Judicial Review of Commission orders is governed by D.C. Code 1973, Title 43, §705. The statute provides for expedited treatment of proper appeals. People's Counsel does not concede that an order denying interim relief is a "final order or decision" within the meaning of §705. People's Counsel suggests that as an interlocutory ruling such an order is not appropriately within the purview of judicial review. That issue need not be reached at this time, however, because PEPCO's appeal is moot in any case. Although PEPCO makes much of the delay of the Court of Appeals in finally ruling on the Motion to dismiss the case as moot, the bulk of this delay occurred after the case had already been made moot in fact.

tional grounds, some amorphous standard which PEPCO itself is unable to state. PEPCO does not like the result which the Commission reached in applying that criteria, and so it is now complaining in a vague way that something must be wrong with the criteria. Yet PEPCO has not suggested any other criteria which in its opinion would be "constitutional," nor has it suggested what relief might be granted to it now that the Commission's decision has been rendered moot.[8] This thrashing and complaining without basis is far afield from any legitimate and important issue to which this Court ought to address its attention.

CONCLUSION

For the reasons stated herein, People's Counsel respectfully urges that this Court deny the petition for a writ of certiorari to the District of Columbia Court of Appeals.

---

[8] The Company's position is so utterly lacking in merit that it would render highly dubious any future claim PEPCO might make to the Commission that the costs incurred in this litigation should be included as an expense in setting new rate levels.

Respectfully submitted,

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September 29, 1979

Supreme Court, U.S.
FILED
OCT 10 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

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POTOMAC ELECTRIC POWER COMPANY, *Petitioner,*

v.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA, PEOPLE'S COUNSEL OF THE DISTRICT OF COLUMBIA, *Respondents.*

MEMORANDUM REPLY BRIEF OF PETITIONER POTOMAC ELECTRIC POWER COMPANY

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

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PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA,
PEOPLE'S COUNSEL OF THE DISTRICT OF COLUMBIA,
Respondents.

MEMORANDUM REPLY BRIEF OF PETITIONER POTOMAC ELECTRIC POWER COMPANY

Petitioner, Potomac Electric Power Company (Pepco), respectfully submits the following memorandum reply to the Brief in Opposition of the People's Counsel of the District of Columbia (People's Counsel) filed with the Court on September 29, 1979.

ARGUMENT IN REPLY

Respondent, People's Counsel, repeatedly argues that consideration of Pepco's *systemwide* financial condition, rather than its *District of Columbia* financial condition, did not violate any constitutional prohibition and was within the Public Service Commission's authority in denying Pepco's application for emergency rate relief. (People's Counsel Brief in Opposition, pp. 4, 9, 10). This is ***precisely*** the recurring issue which

Pepco asked the District of Columbia Court of Appeals to address—and which the Court of Appeals unreasonably ignored—in dismissing, as moot, Pepco's appeal below.

The United States Court of Appeals for the District of Columbia Circuit has stated with respect to the District of Columbia Public Service Commission's use of systemwide financial results as the basis for approval of Pepco's rates that:

> "We must be able to say that the rates in the District are reasonable, just and nondiscriminatory as a part of, or in relation to, the system rates contained in the schedules of the Power Company for areas and services beyond the Commission's jurisdiction; *that is to say, that District consumers do not subsidize the non-District or indeed, vice versa.*" (Emphasis Added) *Capital Transit Co.* v. *Public Utilities Commn* 213 F.2d 176, 182 (D.C. Cir. 1954).[1]

The Public Service Commission unlawfully and unconstitutionally denied Pepco's request for an emergency interim rate increase because it relied on Pepco's more favorable non-District of Columbia financial results (instead of the Company's financial condition in the District of Columbia which clearly demonstrated the need for emergency rate relief) to justify its

[1] Prior to the District of Columbia Court Reform Act of 1973, appeals from the Public Service Commission were made to the federal courts in the District of Columbia.

decision. The District of Columbia Court of Appeals' refusal to hear the appeal of this decision on its merits denied Pepco any means of challenging the Commission's denial of emergency interim rate relief on the basis of a continuing standard which will lead to the same unconstitutional result in subsequent cases.

Respectfully submitted,

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